82-849

No.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

SERGIO ELEJAR MENDOZA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the United States may be collaterally estopped from litigating a question of constitutional law of public importance by the judgment of a district court in a prior case, involving different parties, in which the question was resolved adversely to the United States.

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v.

SERGIO ELEJAR MENDOZA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-21a) is reported at 672 F.2d 1320. The opinion of the district court (App. B, *infra*, 22a-24a) is not officially reported. The findings of fact, conclusions of law, and recommendations of the designated naturalization examiner (App. C, *infra*, 25a-33a) are likewise unreported.

JURISDICTION

The judgment of the court of appeals (App. D, *infra*, 34a) was entered on April 2, 1982, and a timely petition for rehearing was denied on July 22, 1982 (App. E,

infra, 35a). On October 13, 1982, Justice Rehnquist extended the time in which to file a petition for a writ of certiorari to and including November 19, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Sections 701, 702 and 705 of the Nationality Act of 1940, as amended, ch. 199, 56 Stat. 182-183, 8 U.S.C. (Supp. V 1945) 1001, 1002 and 1005; Section 310(e) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1421(e); and 28 C.F.R. 0.20 are reproduced in Appendix G, *infra*, 43a-45a.

STATEMENT

Respondent, a Filipino national, entered the United States in 1975 in a nonimmigrant status. On May 10, 1978, after other legal avenues intended to prolong his stay in the United States had been exhausted or abandoned, respondent filed a petition for naturalization under Section 701 of the Nationality Act of 1940, a provision then no longer in force that had relaxed the normal requirements for naturalization for certain individuals who fought in the United States armed forces in World War II. Respondent claimed that under Section 701 he was entitled to naturalization based upon his service during World War II in the Army of the Commonwealth of the Philippines. The designated naturalization examiner recommended that the petition be denied, noting that respondent was not eligible for naturalization under the provisions of the Immigration and Nationality Act of 1952 then in effect and that naturalization under Section 701 of the 1940 Act was unavailable because petitioner had not filed for naturalization by December 31, 1946, the expiration date of that provision. The examiner also rejected respondent's argument that naturalization was necessary to remedy an alleged denial of due process in the adminis-

tration of Section 701 in the Philippines at the close of World War II.

The district court rejected the naturalization examiner's recommendation and granted the petition without reaching "the Constitutional issues or other merits of the petition" (App. B, *infra*, 22a). The district court concluded that the United States was collaterally estopped to oppose respondent's naturalization petition because the constitutional question presented by the petition had been resolved adversely to the United States in a case involving the naturalization petitions of different individuals, *In re Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931 (N.D. Cal. 1975). The court of appeals affirmed, basing its decision solely upon collateral estoppel grounds.

A. The Background of this Case

1. Respondent served with the Philippine Commonwealth Army as a physician from December 1, 1941, until June 30, 1946. During that time, as the United States became involved in World War II, the Commonwealth Army, which was ordinarily under the control of the semi-autonomous Commonwealth government,[1] was incorporated into the armed forces of the United States pursuant to the order of President Roosevelt. Respondent was held prisoner by Japanese forces from April 1942 until February or March 1945. Upon his release respondent remained in the Commonwealth Army. In the fall of 1945 the United States Army sent respondent to Pennsylvania for approximately six months of medical training. Shortly after his return to the Philippines, on

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[1] Pursuant to Section 10(a) of the Philippine Independence Act of 1934, ch. 84, 48 Stat. 463, the Philippines were scheduled to become a fully independent, self-governing nation on July 4, 1946. Although a United States possession prior to that date, the Philippines enjoyed considerable autonomy under the terms of the Independence Act.

June 30, 1946, respondent secured his discharge from the Commonwealth Army (App. A, *infra*, 7a).

2. The statute upon which respondent's petition for naturalization rests is Section 701 *et seq.* of the Nationality Act of 1940, 8 U.S.C. (Supp. V 1945) 1001 *et seq.*, as added by the Second War Powers Act, 1942, ch. 199, 56 Stat. 182-183. Section 701 exempted certain alien servicemen who served honorably in the United States armed forces during World War II in locations beyond the continental limits of the United States from some of the usual requirements for naturalization, including literacy in English and a period of residence in the United States. As amended by Section 202 (c) (1) of the Act of Dec. 28, 1945, ch. 590, 59 Stat. 658, the Act specified that any petition under Section 701 had to be filed no later than December 31, 1946. Section 702 of the 1940 Act provided for the overseas naturalization of persons in the United States armed forces who were eligible for naturalization under Section 701 but who were beyond the jurisdiction of the United States naturalization courts. Under Section 702, representatives designated by the Commissioner of Immigration and Naturalization were authorized to receive petitions, conduct hearings, and grant naturalization outside the United States.

Pursuant to Section 705 of the 1940 Act, the Commissioner and the Attorney General implemented the provisions of Sections 701 and 702. Between 1943 and 1946 immigration officers traveled on rotation through Great Britain, Ireland, North America and the Pacific Islands, admitting thousands of foreign nationals serving in the United States armed forces to citizenship. Naturalization of alien servicemen in the Philippines, however, was impossible during the Japanese occupation.[2] The liberation

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[2] Between 1942 and 1945, approximately 7000 Filipino servicemembers were naturalized under Section 701 at locations outside the occupied Philippines.

of the Philippines by Allied forces began in February 1945. After resolution of some uncertainties as to the applicability of Section 701 to Filipino servicemen,[3] the Immigration and Naturalization Service, in early August 1945, designated George Ennis, an American vice-consul in Manila, to naturalize aliens pursuant to Section 702. Almost immediately, the Philippine government expressed its concern to the State Department about the possibility that large numbers of young Filipino men, perhaps as many as 250,000, would be naturalized and leave for the United States on the eve of the scheduled Philippine independence (see page 3, note 1, *supra*). On September 13, 1945, the Commissioner of Immigration and Naturalization recommended to Attorney General Clark that the situation be handled by revoking the authority previously granted to Vice-Consul Ennis. The Attorney General approved the Commissioner's recommendation on September 26, 1945, and Ennis' authority to naturalize alien servicemen was thereafter revoked. Naturalizations ceased by October 27, 1945.

The INS subsequently reconsidered and abandoned its prior position (see note 3, *supra*) that members of the Commonwealth Army were eligible for naturalization

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[3] One question was whether service in the Army of the Commonwealth of the Philippines qualified as service in the military forces of the United States for purposes of Section 701. Doubt existed because the Army of the Commonwealth, an instrumentality of the Philippine government, was simply incorporated as a unit into the United States armed forces by Presidential order. By contrast, a separate unit known as the Philippine Scouts was an integral unit of the United States Army; its members had thus individually enlisted in the armed forces of the United States, and their status for this purpose was comparatively free from doubt. In 1945 the INS concluded that members of both Philippine units were covered by Section 701 (but see pages 5-6 & note 4, *infra*). A second question concerned the eligibility for naturalization under Section 701 of Filipinos who had never resided in the United States. The Attorney General concluded that prior residence in the Philippines, then an American possession, satisfied the statute's requirements on that score.

under Sections 701 and 702.[4] Under the revised administrative interpretation, the foreign relations difficulties posed by the presence of a naturalization officer in the Philippines were substantially reduced. Accordingly, in August 1946 the Service again designated a naturalization representative for the Philippines. The representative remained there until December 1946 and naturalized many Philippine Scouts (see page 5 note 3, *supra*) who were still on active duty at that time and were still regarded as eligible under Section 702.[5]

3. Although respondent was present in the Philippines between August and October 1945, when naturalization under Section 702 was possible in the Philippines, it is undisputed that he made no effort to avail himself of that opportunity. Nor did he make any effort to avail himself of the substantive provisions of Section 701, which were available to him without any need for reliance upon the special overseas naturalization provisions of Section 702, during the time he was stationed in Pennsylvania.[6]

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[4] This redetermination was prompted by enactment of the First Supplemental Surplus Appropriation Rescission Act, 1946, ch. 30, 60 Stat. 6, 14, which provided in part that service in the Army of the Commonwealth of the Philippines was not to be deemed service in the United States armed forces for purposes of any United States statute conferring benefits on military veterans. But see page 10 note 9, *infra*.

[5] The First Supplemental Surplus Appropriation Rescission Act (see note 4, *supra*) had no application to members of the Philippine Scouts.

[6] The INS did not adopt its revised interpretation of Section 701, excluding members of the Commonwealth Army from the benefits of that provision, until after the date of respondent's return to the Philippines and his discharge from service.

By the time naturalization was again available in the Philippines under Section 702, respondent was doubly ineligible because he was no longer in service, as well as because the INS regarded service in the Commonwealth Army as nonqualifying under Section 701. Respondent, of course, made no application for naturalization at this time either.

Respondent returned to the United States in 1975 in a nonimmigrant status. His right to remain was extended by the INS through June 9, 1976. During this time respondent operated a restaurant and attempted to start an export-import business. On July 15, 1976, respondent sought to change his status to that of a Treaty Investor. This application was denied by the INS District Director on August 29, 1977, because respondent had not complied with the conditions of his nonimmigrant status. Respondent took an administrative appeal from that decision, but subsequently abandoned that appeal and filed the petition for naturalization under Section 701 at issue in this case.

B. Prior Filipino Veteran Litigation

Because Section 701 required filing of a naturalization petition prior to the close of 1946, its provisons were not the subject of litigation in succeeding years, until a series of novel arguments supporting naturalization resting upon the manner in which Section 702 had been administered in the Philippines gave rise to substantial litigation in the 1970's.[7]

1. In *INS* v. *Hibi*, 414 U.S. 5 (1973), this Court considered the ramifications of that course of administration upon facts strikingly similar to those of the present case. Hibi, a veteran of the Philippine Scouts, entered the United States in 1964 and petitioned for naturalization under Section 701 in 1967. He argued that notwith-

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[7] Section 329 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1440, currently authorizes naturalization of aliens who fought in the United States armed forces during World War II. Unlike its predecessor, Section 701 of the 1940 Nationality Act, however, the benefits of Section 329 are available only to those who either (1) enlisted or were inducted in certain geographical areas (which do not include the Philippines), or (2) are lawfully admitted to the United States for permanent residence. It is accordingly significantly more restrictive than Section 701. Respondent does not meet the requirements of the current provision.

standing 8 U.S.C. 1421(e), which precludes naturalization under provisions of law no longer in effect, the United States was estopped from enforcing the statutory time limit for filing a petition under Section 701 because of an alleged failure to inform him of his opportunity for naturalization, and because of the revocation of Vice-Consul Ennis' naturalization authority in October 1945 and the failure to provide a substitute until August 1946. The district court granted Hibi's petition, adopting his estoppel argument, and the court of appeals affirmed. 475 F.2d 7 (9th Cir. 1973).

This Court summarily reversed, explaining that no estoppel could lie against the government in these circumstances (414 U.S. at 8-9):

> It is well settled that the Government is not in a position identical to that of a private litigant with respect to its enforcement of laws enacted by Congress. • • • Here [the INS] has been charged by Congress with administering an Act which both made available benefits of naturalization to persons in [Hibi's] class and established a cutoff date for the claiming of such benefits. [The INS], in enforcing the cutoff date established by Congress, • • • is enforcing public policy established by Congress.
>
> While the issue of whether "affirmative misconduct" on the part of the Government might estop it from denying citizenship was left open in *Montana* v. *Kennedy*, 366 U.S. 308, 314, 315 (1961), no conduct of the sort there adverted to was involved here. We do not think that the failure to fully publicize the rights which Congress accorded under the Act of 1940, or the failure to have stationed in the Philippine Islands during all of the time those rights were available an authorized naturalization representative, can give rise to an estoppel against the Government.
>
> [Hibi's] effort to claim naturalization under a statute which by its terms had expired more than 20 years before he filed his lawsuit must therefore fail.

2a. In *In re Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931 (N.D. Cal. 1975) (hereinafter "*68 Filipinos*"), the district court (Renfrew, J.), considered the petitions for naturalization resting upon Sections 701-705 of the Nationality Act of 1940 of 68 Filipino veterans who had served in the Commonwealth Army or the Philippine Scouts during World War II.[8] Rejecting the recommendations of the naturalization examiners, the district court granted the petitions with certain exceptions. The district court first considered the claims of those who it found to have filed preliminary applications for naturalization, which had not been acted upon, before the statutory deadline. 406 F. Supp. at 937-940. As to these "Category I" veterans, the court held in the alternative that: (1) the failure to process the submitted applications was "affirmative misconduct," which, notwithstanding *INS* v. *Hibi*, *supra*, "estopped [the United States] from relying upon the expiration date of Sections 701-705 as grounds for denial of their petitions for naturalization" (*id.* at 939; footnote omitted), and (2) because they had done all that was practical to avail themselves of the opportunity provided by Section 701 at the proper time, these veterans should be deemed to have "constructively filed" their petitions for naturalization within the statutory time limit (*id.* at 940).

The district court defined a second category to include 53 veterans who, like the present respondent, had made no effort to secure naturalization under Section 702 in a timely manner. These "Category II" veterans claimed that the absence from the Philippines of an official empowered to effect naturalizations during the period October 1945 through August 1946 denied them equal protection, in violation of the Due Process Clause of the Fifth Amendment, and required that their tardy petitions be granted. In response the government argued

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[8] *68 Filipinos* was not a class action.

that: (1) Filipinos were unprotected by the Due Process Clause at the time in question because of the enactment, in 1934, of the Philippine Independence Act; (2) the veterans' claims were foreclosed by *INS* v. *Hibi*, *supra*; (3) because Attorney General Clark's decision to withdraw naturalization authority from Vice-Consul Ennis responded to the complaint of a foreign government and was based upon considerations of foreign policy, the veterans' claims presented a nonjusticiable political question; and (4) the Attorney General's action did not violate due process.[9] The district court rejected each of these contentions (406 F. Supp. at 940-951). Although it recognized that "the actions of the Commissioner of the INS were motivated by reasonable concern for the maintenance of amicable relations between the United States and the Philippine Islands" (*id.* at 951), the court, applying a strict scrutiny standard,[10] held that "the failure of the Government to have stationed in the Philippine Islands a representative of the INS authorized to naturalize members of the American armed forces pursuant to Section 702 of the Nationality Act during all of the time those statutory rights were available denied petitioners due process of law." Thus, the court granted naturalization to all of the petitioners, except for those ("Category III") veterans who were unable to show that they had ever been eligible for naturalization under Section 701 (406 F. Supp. at 937, 951).

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[9] After the decision in *In re Munoz*, 156 F. Supp. 184 (N.D. Cal. 1957), the INS abandoned the argument that provisions of the First Supplemental Surplus Appropriation Recession Act, 1946, rendered the benefits of Section 701 unavailable to veterans of the Commonwealth Army, and did not otherwise argue thereafter that such veterans did not qualify for naturalization under Section 701. Compare pages 5-6 and notes 3 & 4, *supra*.

[10] In the district court's view, absence of a naturalization officer from the Philippines constituted discrimination upon the basis of race, alienage or nationality, and was accordingly subject to strict scrutiny (406 F. Supp. at 950).

b. Pursuant to authority delegated by the Attorney General to determine whether an appeal should be taken from a judgment adverse to the interests of the United States, see 28 C.F.R. 0.20(b), in March 1976 the Solicitor General authorized an appeal from the district court's decision. An appeal was docketed and the case was briefed and readied for oral argument.

In the interim, however, a new Administration had taken office. By memorandum dated September 21, 1977, (App. F, *infra*, 36a-42a), INS Commissioner Castillo sought authorization to withdraw the pending appeal (App. C, *infra*, 30a). Noting that "[t]he desire expressed by the Philippine Government in 1945 to hold onto its young manpower in the post-war period" was no longer an operative consideration, the Commissioner stressed that acquiescence in the naturalization of the *68 Filipinos* petitioners "would be in keeping with the policy of the [new] Administration," described as "a course of compassion and amnesty" (App. F, *infra*, 41a, 42a). Commissioner Castillo's request provoked considerable discussion, and some dissent, within the Department of Justice. The memoranda prepared for the Solicitor General's consideration reflect the conviction that the district court's legal conclusions were legally erroneous, but that acquiescence in naturalization of the petitioners would be an acceptable remedy for the inequities perceived by the officials vested by law with policy making authority and would not affect significant numbers of individuals or establish a binding precedent. In response to these recommendations, on November 14, 1977, the Solicitor General authorized withdrawal of the pending appeal. On November 30, 1977, the court of appeals granted the government's motion to dismiss the appeal.

c. In the aftermath of these events, Commissioner Castillo was questioned upon his recommendation during congressional oversight hearings.[11] The appropriate re-

[11] Commissioner Castillo explained that his recommendation to withdraw the appeal in *68 Filipinos* was based on equitable consider-

sponse to Filipino veterans' naturalization petitions also received extensive reconsideration within the Department of Justice. The position ultimately adopted in 1978, after thorough reexamination, was that the Department would not ordinarily oppose naturalization of Filipino veterans who actually attempted to become naturalized United States citizens pursuant to Sections 701 and 702 while those provisions were in effect—*i.e.*, "Category I" veterans. Contrary to the position adopted in withdrawing the appeal in *68 Filipinos*, however, the Department instructed the INS thereafter to oppose naturalization of those who could not satisfy this prerequisite—*i.e.*, "Category II" veterans. App. C, *infra*, 30a; see *Olegario* v. *United States*, 629 F.2d 204, 214 (2d Cir. 1980), cert. denied, 450 U.S. 980 (1981).[12]

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ations "aside from the legal argument of, was correct procedure of process used." *Oversight of INS Programs and Activities: Hearings Before the Subcomm. on Immigration, Citizenship and International Law of the House Comm. on the Judiciary*, 95th Cong., 2d Sess. 272 (1978).

[12] To mitigate the effects of this change in policy, the Department adopted a "grandfather rule" exception for persons who had filed naturalization petitions prior to the withdrawal of the government's appeal in *68 Filipinos*. See *Olegario* v. *United States*, *supra*, 629 F.2d at 214-215. There was reason to believe that processing of at least some such petitions had been delayed by INS, either unilaterally or by agreement with opposing counsel, in anticipation of securing a definitive ruling upon appeal in *68 Filipinos*. It was further recognized that absent that procedure some of the petitions involved would have been granted at the time the government withdrew its *68 Filipinos* appeal. Because it was thought difficult to determine with confidence which petitioners had relied to their detriment upon such procedural understandings, the Solicitor General authorized withdrawal of previously authorized appeals in all cases falling within the "grandfather rule" and declined to authorize appeal in other such cases. Among the appeals withdrawn were those in *In re Nisperos*, 471 F. Supp. 296 (C.D. Cal. 1979); and *In re Colmenar*, No. 308-P-22551 (S.D. Cal. Mar. 20, 1979). See App. A, *infra*, 8a.

3. The issues presented by the tardy filing of naturalization petitions by Filipino veterans resting on Section 701 were considered by the Second Circuit in *Olegario* v. *United States*, *supra*. Adopting Judge Renfrew's reasoning in *68 Filipinos*, the district court had granted Olegario's petition for naturalization, 473 F. Supp. 185 (S.D. N.Y. 1979), and the government appealed.[13] On appeal, the Second Circuit considered the argument that under *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979), the decision in *68 Filipinos* should be given collateral estoppel effect, so as to preclude denial of naturalization to any "Category II" Filipino veteran. The Second Circuit rejected this argument, observing that "[i]n contrast to *Parklane*, the government is the defendant here, and the case raises important issues of national concern." 629 F.2d at 215. The court observed that the government's failure to appeal an adverse decision may rest upon policy considerations rather than acquiescence in the legal reasoning upon which it rests, and that the invocation of collateral estoppel would compel the Solicitor General to authorize appeal from adverse decisions in an uncritical manner (*ibid.*). The court also stressed that the United States has broad discretion whether to pursue an appeal in a particular case and remain free to reverse its position to correct prior legal positions perceived to have been ill-advised (*id.* at 216). Turning to the merits, the Second Circuit concluded that the absence of a naturalization officer from the Philippines during part of the period when naturalization was available under Section 701 did not violate the statute or work a denial of due process or equal protection. 629 F.2d at 223-233. Accordingly, the Second Circuit reversed the district court and ordered that Olegario's petition be denied.

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[13] Olegario was a "Category II" veteran—*i.e.*, he had not made a timely effort to avail himself of the benefits of Section 701. Nor was his petition filed in time to benefit from the "grandfather rule" adopted by the Solicitor General (see page 12 note 12, *supra*).

C. Proceedings Below

1. Respondent filed his naturalization petition invoking Section 701 of the 1940 Nationality Act on May 10, 1978. The designated naturalization examiner recommended denial of the petition. The examiner noted that respondent could not qualify for naturalization under the current provision for naturalization of alien servicemen, 8 U.S.C. 1440 (see page 7 note 7, *supra*), and that 8 U.S.C. 1421(e) precludes naturalization under expired or superseded statutory authority. Because respondent had not claimed that he sought naturalization under Section 701 in a timely manner, and because respondent had actually been in Pennsylvania for much of the time naturalization was unavailable in the Philippines, the examiner concluded that respondent could not be deemed to have constructively filed his petition under the 1940 Act; respondent's petition was therefore barred by 8 U.S.C. 1421(e). Similarly, given these facts, the examiner found no more basis for an estoppel than was present in *Hibi*, and notwithstanding *68 Filipinos*, found that respondent had not suffered any denial of due process (App. C, *infra*, 25a-33a).

The district court granted respondent's petition without reaching the merits, treating the matter as a routine application of the doctrine of offensive nonmutual collateral estoppel under *Parklane Hosiery Co.* v. *Shore*, *supra*. Although the naturalization examiner had noted (App. C, *infra*, 31a) that the effect of 8 U.S.C. 1421(e) had not been considered in *68 Filipinos*, and that respondent, unlike the *68 Filipinos* petitioners, had been in Pennsylvania for most of the relevant time period, the district court did not address these issues.

2. The Solicitor General authorized an appeal.[14] The government once again argued that respondent's consti-

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[14] Like Olegario, respondent was a "Category II" veteran and had not filed his petition in time to benefit from the Solicitor General's "grandfather rule" (see page 12 note 12, *supra*).

tutional claim was nonjusticiable, and in any event without merit. Several arguments not considered in *68 Filipinos* were also advanced: (1) the constitutional claim was barred by laches; (2) the claim was barred by 8 U.S.C. 1421(e); (3) the remedy awarded for the alleged constitutional violation—naturalization—was tantamount to an equitable estoppel, and thus inconsistent with *Hibi*; and (4) respondent lacked standing to complain of the withdrawal of a naturalization officer from the Philippines, and had suffered no personal deprivation of rights, because he was in Pennsylvania for most of the period in question. The court of appeals affirmed, reaching only the collateral estoppel issue.[15]

The court of appeals concluded that, under *Parklane Hosiery*, the district court did not abuse its discretion in applying collateral estoppel to bar consideration of the government's legal arguments against respondent's naturalization. The court of appeals stated that none of the circumstances listed by this Court in *Parklane Hosiery* (439 U.S. at 329-331 and nn. 14 & 15) as precluding an estoppel was present here. The court also stressed the lack of record support for the government's suggestion that the withdrawal of the appeal in *68 Filipinos* was based in part upon a misapprehension of the practical consequences of doing so, and it questioned whether the underlying issue was, in fact, of sufficient practical importance to warrant a fresh determination of the legal issue (App. A, *infra*, 12a-15a). The court of appeals acknowledged the conflicting decision of the Second Circuit in *Olegario*, but it considered that ruling to be neither persuasive

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[15] The court of appeals stated that because respondent may have been in the Philippines for as much as three months during which time he was eligible for naturalization but no naturalization official was present, "this is * * * sufficient * * * to implicate his due process rights and place him in the same situation as [the] Category II veterans" whose rights were litigated in *68 Filipinos* (App. A, *infra*, 12a n.8). The court did not address the other issues raised by the government that had not been decided in *68 Filipinos*.

respecting the collateral estoppel issue nor reason enough to deny preclusive effect to *68 Filipinos* (*id.* at 16a-18a).

Finally, the court of appeals rejected the government's contentions that *Parklane Hosiery* was inapposite because of the special attributes and interests of the United States as a litigant and the purely legal character of the questions presented here (App. A, *infra*, 18a-20a). Although it acknowledged that "the government is frequently involved in cases raising issues of great public importance, and that in such cases the public interest in permitting the government to relitigate those issues may outweigh the public interest in avoiding needless litigation" (*id.* at 18a), the court concluded that this is not such a case because it found "no 'critical' need for redetermination" of the issue and "no compelling public interest in opposing naturalization" of persons such as respondent (*id.* at 19a, 20a). On the contrary, the court thought that the equities strongly supported preclusion (*id.* at 20a-21a).

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals is without precedent. To our knowledge no other appellate court has ever held that the United States may be estopped from litigating a pure question of law, much less a question of constitutional law affecting the special prerogatives of the Executive in the sphere of foreign relations, by the unappealed adverse decision of a trial level court rendered in a different action involving a different opposing party. If permitted to stand, the decision below would compel a drastic alteration of the federal government's salutary practice of selective pursuit of appeals, thereby imposing a substantial burden upon the courts of appeals and, ultimately, this Court. Moreover, the court of appeals failed to heed this Court's admonition in ~~*United States*~~ v. *Hibi*, 414 U.S. 5, 8 (1973), that "the government is not in a position identical to that of a private litigant with respect to its enforcement of laws enacted by Congress." By con-

trast, the Second Circuit, in considering a claim identical to respondent's, recently refused to apply collateral estoppel to prevent the government from litigating the legal issue. *Olegario* v. *United States*, 629 F.2d 204 (1980), cert. denied, 450 U.S. 980 (1981). This Court should resolve the conflict.

1.a. Contrary to the view of the court of appeals, *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979), is not controlling here. In *Parklane Hosiery*, the issues upon which preclusion was upheld were factual (see *id.* at 324); here, the underlying issue in dispute is an unmixed question of law, indeed a significant question of constitutional law. This Court has recognized that powerful considerations militate against extension of the preclusion doctrine to purely legal issues—especially those of constitutional impact—even when the parties in the successive lawsuits are the same. *Montana* v. *United States*, 440 U.S. 147, 162-163 (1979); *United States* v. *Moser*, 266 U.S. 236, 242 (1924). Application of the preclusion doctrine to a legal issue where there is no identity of parties is especially inappropriate.

b. This Court also stated in *Parklane Hosiery* that the courts should refuse to apply nonmutual collateral estoppel in circumstances where such use would for any reason "be unfair to a defendant." 439 U.S. at 331. We submit that the special attributes and role of the United States as a litigant strongly militate against application of the issue preclusion doctrine to the government, particularly when it is engaged in the uniquely sovereign function of enforcing the public law. This Court recognized these unique attributes in *Standefer* v. *United States*, 447 U.S. 10 (1980), in declining to apply the rule of nonmutual collateral estoppel announced in *Parklane Hosiery* and *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313 (1971), against the government in a criminal case. The Court stated, in terms that are fully applicable here (447 U.S. at 24-25):

Finally, this case involves an ingredient not present in either *Blonder-Tongue or Parklane Hosiery*: the important federal interest in the enforcement of the criminal law. *Blonder-Tongue* and *Parklane Hosiery* were disputes over private rights between private litigants. In such cases, no significant harm flows from enforcing a rule that affords a litigant only one full and fair opportunity to litigate an issue, and there is no sound reason for burdening the courts with repetitive litigation.

That is not so here. The court of appeals put the point well:

> "[T]he purpose of a criminal court is not to provide a forum for the ascertainment of private rights. Rather it is to vindicate the public interest in the enforcement of the criminal law while at the same time safeguarding the rights of the individual defendant. The public interest in the accuracy and justice of criminal results is greater than the concern for judicial economy professed in civil cases and we are thus inclined to reject, at least as a general matter, a rule that would spread the effect of an erroneous acquittal to all those who participated in a particular criminal transaction. To plead crowded dockets as an excuse for not trying criminal defendants is in our view neither in the best interest of the courts, nor the public." 610 F.2d, at 1093.

In short, this criminal case involves "competing policy considerations" that outweigh the economy concerns that undergird the estoppel doctrine.

The fact that this case is not a criminal prosecution does not dilute the strength of these factors. Whenever the government acts in its sovereign capacity to enforce the public laws, public policy dictates the applicability of the *Standefer* analysis. This is especially so where, as here, the government acts to ensure enforcement of the immigration and naturalization laws, which this Court

has recognized as "[a]n increasingly important interest • • • of broad public concern." *INS* v. *Miranda*, No. 82-29 (Nov. 8, 1982), slip op. 5; see also *INS* v. *Hibi*, *supra*, 414 U.S. at 8; *Fedorenko* v. *United States*, 449 U.S. 490, 506-507 (1981).

In addition, numerous practical and legal considerations, applicable in criminal and noncriminal cases alike, set the United States apart from any other litigant and argue strongly against the estoppel invoked by the court of appeals. The government is involved in far more litigation than any other party.[16] In 1981, for instance, the Solicitor General received recommendations respecting the desirability of appellate review of a decision adverse to the government in over 1850 cases. Second, many of the issues of greatest public importance, including constitutional issues, arise only in litigation to which the government is a party, and others are characteristically associated with government litigation. Third, the government, unlike other litigants, necessarily finds itself in litigation presenting a particular legal issue in a host of jurisdictions—indeed potentially (and not uncommonly) in every district and circuit. In such cases, which include the present one, the potential unfairness of invoking the preclusion doctrine absent mutuality (see *Parklane Hosiery Co.* v. *Shore*, *supra*, 439 U.S. at 330 & n.14) is necessarily present, for there is a substantial likelihood that in litigating a recurring issue, the government will at some point encounter an adverse decision.

Because of these unique attributes of government litigation, application of collateral estoppel in the circumstances of cases such as the present one would substan-

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[16] In a recent year the United States was a party to 63,628 civil cases filed in the United States District Courts, 37.7% of total filings. Administrative Office of the United States Courts, *Annual Report of the Director* 224, 227 (1980). In the same year the United States was party to 4,654 and 14,854 civil cases appealed from the district courts to the courts of appeals as well as 2950 original actions to review the decision of an administrative agency. *Id.* at 203, 205.

tially disrupt the existing process of development of the law through resolution of conflicts by appeal, en banc review and certiorari, by supplanting the more flexible doctrine of *stare decisis* and the persuasive effect of decisions of coordinate courts with the rigid doctrine of issue preclusion.[17] As the American Law Institute has recognized, when "the party against whom the rule of preclusion is to be applied is a government agency responsible for continuing administration of a body of law applicable to many similarly situated persons * * * the rule of preclusion should ordinarily be superseded by the less limiting principle of *stare decisis*." *Restatement (Second) of Judgments* § 29, comment i (1980).[18]

Furthermore, invocation of collateral estoppel against the government on legal issues of public importance is inappropriate because, through the Office of the Solicitor General, the government, unlike any other litigant, employs a formal mechanism for selective prosecution of appeals from adverse judgments. The government alone regularly takes into account factors other than its narrow interest in prevailing in the particular lawsuit in determining whether to seek further judicial review. As a result, the Solicitor General frequently decides against

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[17] The court of appeals' suggestion (App. A, *infra*, 17a) that the considerations we have canvassed might be more weighty when an issue arises in two different circuits simply illustrates the court's failure to recognize the distinction between collateral estoppel and *stare decisis*. Moreover, considered within the framework usually reserved for *stare decisis*, the court's observation is unsound. Under the court of appeals' analysis the decision of a single inferior court may be binding upon a court of appeals, while the authority of decisions of one or more courts of appeals, even those rendered en banc, may be regarded as merely persuasive.

[18] The *Restatement* also cautions against use of collateral estoppel "when the issue was determined in the first action by a trial court and in the second action will probably be taken to an appellate court," and when "the issue is of general interest and has not been resolved by the highest appellate court that can resolve it." *Restatement (Second) of Judgments* § 29, comment i. The decision of the court of appeals disregards these strictures as well.

appeal or certiorari even though the legal conclusions of the deciding court are believed to be erroneous. Such decisions rest upon a host of other factors including: a substantial measure of prosecutorial discretion, equitable and policy considerations,[19] the perceived practical importance of the decision, recognition of the limited resources of the government and sensitivity to crowded dockets of the courts.[20] As we have explained above (pages 11-12), the decision not to pursue an appeal in *68 Filipinos* was just such a decision.

Adoption of the novel rule endorsed by the court of appeals would compel the United States to reconsider this salutary practice, which benefits the public interest and facilitates sound judicial management. Instead, the government would be obliged to consider an inflexible policy of appealing (and even seeking certiorari on) the first adverse decision rendered on a legal issue. As a result, the courts of appeals and this Court would be burdened

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[19] The United States, even as a litigant, does not abandon its responsibilities as the government. As this Court has remarked, "[t]here is, of course, no rule of law to the effect that the Government must be consistent in its stance in litigation over the years. It has changed positions before." *Barrett* v. *United States*, 423 U.S. 212, 222 n.6 (1976). See also *NLRB* v. *Iron Workers*, 434 U.S. 335, 351 (1978); *Dixon* v. *United States*, 381 U.S. 68, 70-75 (1965); *Automobile Club* v. *Commissioner*, 353 U.S. 180, 183 (1957). As this case illustrates, the political process by which the United States changes policies from time to time in a democratic society is itself a powerful reason to preclude collateral estoppel against the government on matters of public law. Indeed, the decision of the court of appeals permits one administration to bind its successors even on questions of constitutional law.

[20] See, *e.g.*, Note, *The Solicitor General and Intragovernmental Conflict*, 76 Mich. L. Rev. 324, 324-330 (1977); Carrington, *United States Appeals in Civil Cases*, 11 Hous. L. Rev. 1101, 1101-1105 (1974); Bork, *The Problems and Pleasures of Being Solicitor General*, 42 A.B.A. Antitrust L. J. 701 (1973); Note, *Government Litigation in the Supreme Court: The Roles of the Solicitor General*, 78 Yale L. J. 1442, 1453-1457 (1969); Sobeloff, *Attorney for the Government: The Work of the Solicitor General's Office*, 41 A.B.A.J. 229 (1955).

prematurely and unnecessarily, and judicial economy—the touchstone of the preclusion doctrine—would be disserved. Moreover, because of the limited docket of this Court, and the proliferation of statutes and litigation in recent years, constructions of the law that this Court might ultimately determine to be erroneous would more often be given finality. See, *e.g.*, *United States* v. *Foster Lumber Co.*, 429 U.S. 32 (1976) (rejecting the view of three courts of appeals); *NLRB* v. *Enterprise Association of Pipefitters*, 429 U.S. 507 (1977) (rejecting the view of five courts of appeals). Plainly, there is no interest served by invocation of collateral estoppel in the circumstances of this case that would justify these detrimental consequences.[21]

2. These considerations led the Second Circuit in *Olegario* v. *United States*, *supra*, upon the very facts presented here, to refuse to apply collateral estoppel against the government. The Second Circuit explained that, "[i]n contrast to *Parklane*, the government is the defendant here, and the case raises important issues of national concern." 629 F.2d at 215. The Second Circuit also pointed out that the government's decision to forego further judicial review of an adverse decision, as in *68 Filipinos*, may result from a variety of factors unrelated to the legal issues in the case. "If each adverse decision were accorded the collateral estoppel effect urged * * *, the Solicitor General would be forced to seek review of cases that would not otherwise be appealed." *Ibid.* Other courts have reached similar conclusions, refusing to invoke col-

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[21] At a minimum there is no basis for the court of appeals' assertion (App. A, *infra*, 15a) that "[i]t should have come as no surprise to the government" that Judge Renfrew's decision in *68 Filipinos* would reach the claim of every Filipino veteran. *Parklane Hosiery* had not been decided at the time the *68 Filipinos* appeal was withdrawn. The proper mechanism for putting the government on notice that litigation on a particular matter will bind an entire class of litigants is to seek class action certification. See Fed. R. Civ. P. 23; *Califano* v. *Yamasaki*, 442 U.S. 682, 698-703 (1979).

lateral estoppel against the government on purely legal issues of public importance, at least absent a complete identity of parties. See, *e.g.*, *American Medical International, Inc.* v. *Secretary of Health, Education and Welfare*, 677 F.2d 118, 121-124 (D.C. Cir. 1981); *Divine* v. *Commissioner*, 500 F.2d 1041 (2d Cir. 1974). The decision of the court below thus stands in sharp contrast to the decisions of other courts.

To be sure, the court of appeals acknowledged that collateral estoppel might not be applicable in some government cases presenting legal issues (App. A, *infra*, 19a). But because the court below saw no "'critical' need for redetermination" of the underlying constitutional issue (*ibid.*) and no "compelling public interest in opposing the naturalization" of persons such as respondent (*id.* at 20) and believed that the equities favored respondent (*id.* at 20a-21a), it held that the government was precluded from relitigating the constitutional issues presented. None of these considerations justifies the court of appeals' conclusion.[22] As explained above (pages 18-19), the decisions of this Court, including *Hibi*, reflect that the enforcement of the naturalization laws in every individual case is of utmost public importance. Judge Renfrew's holding in *68 Filipinos* that the actions of an Attorney General taken for foreign policy reasons acknowledged to be valid effected a denial of due process is necessarily significant, without regard for the number of persons involved or the court of appeals' assessment of the equities. Moreover, while this Court's decision in *Hibi* makes clear that the equitable considerations mentioned by the court below are irrelevant to the merits of respondent's claim, it is particularly clear that these equities have no place in the calculus of decision when the

[22] The court of appeals' necessarily subjective conclusions regarding the "critical need for redetermination" and "compelling public interest" also provide no standard for accurate prediction of which legal rulings, if not appealed by the government, would be given collateral estoppel effect in the future.

issue is not whether respondent is entitled to naturalization, but only whether the United States is foreclosed from securing an adjudication of that question.

3. We have explained above that, because of the unique situation of the government in enforcing the public law, nonmutual collateral estoppel on issues of law should never be applied against the United States. But even if that were not so generally, and *Parklane Hosiery* were regarded as controlling in government litigation, the court of appeals erred in approving application of that doctrine here.

First, the Court emphasized in *Parklane Hosiery* that the doctrine of nonmutual collateral estoppel must always be applied selectively and cautiously. 439 U.S. at 329-331. The Court mentioned, for example, that issue preclusion would be inappropriate when "the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant." *Id.* at 330 (footnote omitted). Here, of course, as the court of appeals acknowledged (App. A, *infra*, 16a), Judge Renfrew's decision conflicts with the Second Circuit's subsequent decision in *Olegario*. See page 13, *supra*. In addition, decisions inconsistent with *68 Filipinos* have been rendered in *In re Kapili*, 473 F. Supp. 600 (E.D. N.Y. 1979); *In re Naturalization of Inton*, No. SA-79-CA-284 (W.D. Tex. July 3, 1980); *Pangilinan* v. *INS*, Pet. No. 251849 (N.D. Cal. Sept. 24, 1980), appeal pending, No. 80-4543 (9th Cir.); *Barretto* v. *United States*, Pet. No. 248806 (N.D. Cal. Aug. 15, 1980), appeal pending, No. 80-4441 (9th Cir.). In view of this division of authority, the court of appeals was plainly required to take an independent look at the merits of respondent's constitutional claim.[23]

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[23] An additional factor that should have caused the court of appeals to address the merits is the substantial tension between Judge Renfrew's conclusion that Attorney General Clark's actions denied due process to Filipino veterans and this Court's conclusion in *Hibi* that the very same actions were not affirmative misconduct. Indeed,

Other factors also should have precluded any estoppel here. As we have noted (pages 14-15 & note 15, *supra*), the court of appeals rested its decision entirely upon the preclusive effect of *68 Filipinos*, even though significant legal arguments not addressed by Judge Renfrew were presented by the government throughout the litigation of respondent's claim. The court of appeals thus effectively applied the broader res judicata ("claim preclusion") doctrine, rather than collateral estoppel, to bar all arguments the United States might raise in answer to respondent's claim. See *Allen* v. *McCurry*, 449 U.S. 90, 94 & n.5 (1980). There can be no justification for the court of appeals' failure to consider legal arguments that might have been, but were not, addressed in *68 Filipinos*.

An equally remarkable feature of the decision below is the court's conclusion (App. A, *infra*, 11a n.8) that respondent's residence in Pennsylvania during most of the time a naturalization examiner was absent from the Philippines does not serve to distinguish him sufficiently from the petitioners in *68 Filipinos* to require an independent determination of his right to naturalization. While we question whether any person who made no effort to avail himself of the opportunity for naturalization provided by Section 701 of the 1940 Nationality Act should be heard to complain of the temporary absence of a naturalization official from the Philippines, it is far clearer that persons such as respondent can make no such claim. And even if, as the court of appeals thought, the facts of this case "implicate" respondent's due process

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the arguments made in this Court by Hibi include ones virtually indistinguishable from those approved by Judge Renfrew in *68 Filipinos* but for the label used to describe them. See 72-1652 Memorandum in Opposition (at 6, 12) (1973 Term). In these circumstances, due regard for the authority of this Court's decisions required the court of appeals to treat the decision in *68 Filipinos* as one at least potentially "inconsistent with * * * [a] previous judgment[] in favor of" the United States. *Parklane Hosiery Co.* v. *Shore*, *supra*, 439 U.S. at 330.

rights (App. A, *infra*, 12a n.8), there is no reason whatever to conclude that the holding of *68 Filipinos*, which takes no account of these facts, precludes a determination on the merits here. By invoking collateral estoppel, the court of appeals failed to discharge its duty to determine whether, on the facts of this case, respondent is entitled to naturalization under the laws of the United States.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1982

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 79-3478

IN THE MATTER OF PETITION FOR NATURALIZATION OF SERGIO ELEJAR MENDOZA, PETITIONER-APPELLEE

v.

UNITED STATES OF AMERICA, RESPONDENT-APPELLANT

Argued and Submitted May 6, 1981

Decided April 2, 1982

Appeal from the United States District Court
for the Central District of California

Before TANG and NORRIS, Circuit Judges; and CARROLL,* District Judge.

NORRIS, Circuit Judge:

The issue raised by this appeal is whether the district court abused its discretion in collaterally estopping the government from relitigating the constitutionality of the Attorney General's decision to withdraw a naturalization examiner from the Philippines in 1945. We hold there was no abuse of discretion and affirm.

I

HISTORICAL BACKGROUND

The historical events giving rise to appellee Sergio Mendoza's claim for naturalization are undisputed.

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* The Honorable Earl H. Carroll, United States District Judge for the District of Arizona, sitting by designation.

In March, 1942, Congress amended the Nationality Act of 1940, Pub.L. No. 76-853, 54 Stat. 1137 (1940) to provide for the naturalization of non-citizens who served honorably in the United States armed forces. Section 701 exempted alien servicemen from some of the usual naturalization requirements, such as a period of residence and literacy in English. Section 702 provided for overseas naturalization of those eligible under section 701 who were in active service in the military and not within the jurisdiction of any court authorized to naturalize aliens. Section 705 provided that the "Commissioner [of Immigration and Naturalization] with the approval of the Attorney General, shall prescribe and furnish forms, and shall make such rules and regulations, as may be necessary to carry into effect the provisions of this Act." The Act was subsequently amended to specify that all naturalization petitions filed under section 701 must be submitted by December 31, 1946. Act of Dec. 28, 1945, Pub.L. No. 79-270, (c), 59 Stat. 658 (1945).

Pursuant to the Act, INS officers were sent overseas to naturalize eligible members of the United States military. From 1943-46, these officers traveled from post to post through England, Ireland, North Africa and the Pacific, naturalizing servicemen. In early August, 1945, following the liberation of the Philippines, the INS designated George Ennis, Vice Consul in Manila, to naturalize Filipino servicemen under the Act.[1]

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[1] The INS and the Attorney General had concluded that members of the Army of the Commonwealth of the Philippines qualified as servicemen in the United States armed forces.

The Philippines was scheduled to become independent on July 4, 1946. Philippine Independence Act of 1934, Pub. L. No. 73-127, § 10(a), 48 Stat. 463 (1934). The Philippine government apparently feared that naturalizations under section 702 would cause large numbers of Filipinos to emigrate to the United States, draining that country of much-needed manpower. These fears were communicated by the Philippine government to the United States Department of State, which passed them on to the INS Commissioner. In September, 1945, the Commissioner wrote to the Attorney General:

> The Philippine Government again has expressed to the Department of State its concern because Filipino members of the armed forces of the United States are being naturalized even though they have always been domiciled in the Philippine Islands. . . . In view of the concern expressed by the Philippine Government, it is my belief that the situation might best be handled by revoking the authority previously granted to Mr. Ennis and by omitting to designate any representative authorized to confer citizenship in the Philippine Islands. This course would eliminate a source of possible embarrassment in our dealings with the Philippine people, who probably will be awarded independence in the near future.

Memorandum to Attorney General Tom C. Clark from INS Commissioner Ugo Carusi (September 13, 1945).

Acting upon the Commissioner's recommendation, the Attorney General revoked Vice Consul Ennis' naturalization authority and on October 26, 1945, naturalizations in the Philippines were halted. No new naturalization officer was appointed for the

Philippines until August, 1946. Thus, for nine months no INS official was present in the Philippines to implement the 1940 Act.

II

THE MATTER OF NATURALIZATION OF 68 FILIPINO WAR VETERANS

In 1975, the claims of 68 Filipino war veterans whose petitions for naturalization pursuant to sections 701-705 of the Nationality Act of 1940 had been denied by the Immigration and Naturalization Service (INS) were joined in the United States District Court for the Northern District of California. *Matter of Naturalization of 68 Filipino War Veterans*, 406 F.Supp. 931 (N.D.Cal. 1975) (Renfrew, J.) (*68 Filipinos*). The veterans claimed that although sections 701-705 of the 1940 Act had expired, their petitions should be granted because the United States government had failed to station in the Philippines from October 1945 to August 1946 an INS examiner authorized to naturalize members of the American armed forces pursuant to section 702 of the Act.

In his opinion, Judge Renfrew divided the petitioners into three categories. Category I consisted of those veterans who had taken action to become naturalized prior to December 31, 1946 but had not been processed by the INS. Category II consisted of those veterans who were eligible for citizenship under the 1940 Act but did not file petitions before the Act expired. Category III included those petitioners who were unable to prove eligibility for naturalization under the 1940 Act. *Id.* at 936-37.

Judge Renfrew found that Category I veterans had been victims of "affirmative misconduct" by the INS and that the government was thus equitably estopped

from denying their petitions. In addition, Judge Renfrew held that Category I veterans had "constructively filed" their petitions for naturalization prior to the expiration of the 1940 Act, thus complying with the 1946 statutory deadline for filing. *Id.* at 937-40.

Judge Renfrew next addressed the claims of the Category II veterans. As a threshold matter, he ruled that their claim that their due process rights had been violated by the government's decision to withdraw naturalization authority from Vice Consul Ennis was not a non-justiciable "political question." [2] *Id.* at 943-48. He next held that the constitutional claims were not barred by *INS* v. *Hibi*, 414 U.S. 5, 94 S.Ct. 19, 38 L.Ed.2d 7 (1973).[3] 406 F.Supp. at

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[2] Judge Renfrew applied the six-pronged test set forth in *Baker* v. *Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 710, 7 L.Ed.2d 663 (1962). Noting that it is error to suppose that all cases touching upon foreign affairs are nonjusticiable, 406 F.Supp. at 945, he concluded that the judicial standards of equal protection and due process are well-developed; that the case involved no "initial policy determination of a kind clearly for nonjudicial discretion," since Congress had already established the relevant policy by enacting Sections 701-705 of the 1940 Act; that there was no especial need for unquestioning adherence to a political decision already made since it was unlikely that the foreign policy of the United States would be affected by the court's consideration of the merits in that case, and that there was little likelihood that "multifarious pronouncements by various departments on one question" would embarrass the United States. *Id.* at 945-47.

[3] In *INS* v. *Hibi*, a Filipino who had served in the United States military sought naturalization under section 701 of the 1940 Act. The veteran claimed that the Government was equitably estopped from relying on the expiration date of the 1940 Act (December 31, 1946) because it had failed to advise him, during the time he was eligible, of his right to naturaliza-

942-43. Finally, Judge Renfrew held that the government's withdrawal of its naturalization examiner from the Philippines during 1945-46 had deprived Category II veterans of their due process rights. Applying the equal protection component of the Due Process Clause of the Fifth Amendment, Judge Renfrew reasoned that:

> although the Court has no doubt that the actions of the Commissioner of the INS were motivated by reasonable concern for the maintenance of amicable relations between the United States and the Philippine Islands, that concern alone, when considered in light of the suspect nature of the classification herein, and the strictness of the applicable constitutional standard, is insufficient justification for violating petitioners' rights.

Id. at 951.

Accordingly, Judge Renfrew also granted the petitions for the Category II veterans.

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tion, and because the government had failed to provide a naturalization officer in the Philippines during the time he was eligible. 414 U.S. at 5-8, 94 S.Ct. at 19-21. The Court rejected this claim, ruling that while it remained an open question whether affirmative misconduct on the part of the government might estop it from denying citizenship, the failure to fully publicize the rights accorded war veterans under the 1940 Act and the failure to station an authorized naturalization officer in the Philippines was not such misconduct. *Id.* at 8-9, 94 S.Ct. at 21-22.

Hibi was a summary reversal without the benefit of briefing or oral argument. The sole issue was one of equitable estoppel, and was therefore not, in Judge Renfrew's view, dispositive of the petitioners' constitutional claims in *68 Filipinos*. 406 F.Supp. at 942-43.

Category III veterans were given 90 days to produce proof that they had served in the United States armed forces in the Philippines and were thus eligible for naturalization under the 1940 Nationality Act. *Id.* at 951. After 90 days, no such proof was forthcoming, and their petitions were denied.

The government filed a notice of appeal in *68 Filipinos* but subsequently withdrew its appeal.

III

DR. MENDOZA

Petitioner, Sergio Elejar Mendoza, is a 73-year old Filipino citizen currently residing in this country. He served in the armed forces of the United States as a medical doctor from December 1, 1941 until June 30, 1946. In 1942, he was captured by the Japanese and survived the notorious Bataan Death March. In February or March, 1945, Dr. Mendoza was released by the Japanese. In the fall of 1945, he was sent to the United States for army medical training, and spent approximately six months in Pennsylvania. Thereafter, he returned to the Philippines, where he stayed until his discharge from the military. At no time during 1945-46 did Dr. Mendoza make any efforts to become an American citizen.[4] In 1978, he filed for naturalization as a Filipino war veteran pursuant to sections 701-706, claiming that he was denied due process of law by the government's actions in 1945-

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[4] Such inaction is not surprising since many Filipino soldiers imprisoned by the Japanese were unaware of their right to apply for naturalization. *See, e.g., Olega[illegible] v. United States*, 629 F.2d 204, 211 (2nd Cir. 1980), *cert. denied*, 450 U.S. 980, 101 S.Ct. 1513, 67 L.Ed.2d 814 (1981).

46.[6] Judge Lucas found that Dr. Mendoza was a Category II veteran for the purpose of applying Judge Renfrew's decision in *68 Filipinos*, and he held the government collaterally estopped from relitigating the issues decided in *68 Filipinos*. The government appealed Judge Lucas' order granting Dr. Mendoza citizenship. We note jurisdiction under 28 U.S.C. § 1291.

IV

OTHER FILIPINO WAR VETERAN CASES

Prior to Judge Lucas' decision in Dr. Mendoza's case, two other district judges in this circuit held that the government is collaterally estopped by *68 Filipinos* from relitigating the constitutional issue raised by the Filippino war veterans. *See Petition of Nisperos*, 471 F.Supp. 296 (C.D.Cal. 1979); *Petition of Crispulo Columna Colmenar*, No. 308-P-22551 (S.D. Cal. March 20, 1979). Shortly after Dr. Mendoza's petition was granted, however, the Second Circuit, in *Olegario* v. *United States*, 629 F.2d 204 (1980), *cert. denied*, 450 U.S. 980, 101 S.Ct. 1513, 67 L.Ed.2d 814 (1981), held that the government was not collaterally estopped by *68 Filipinos* from contesting Olegario's naturalization petition; on the merits, the Second Circuit disagreed with Judge Renfrew in *68 Filipinos* and held that the government's decision to withdraw naturalization authority from Vice Consul Ennis violated no due process rights of Filipino veterans.

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[6] Mendoza last entered the United States on June 12, 1975, and was ordered to depart on June 29, 1978. Were this court to reverse the judgment below granting his petition for naturalization, he would be subject to deportation under 8 U.S.C. § 1251(a)(9) (1976).

V

COLLATERAL ESTOPPEL

In the seminal case of *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 332, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979), the Supreme Court held that federal trial courts have broad discretion to apply collateral estoppel offensively in the interest of avoiding needless litigation. In this case, we hold that Judge Lucas did not exceed the bounds of his discretion in estopping the government from relitigating, in opposition to Dr. Mendoza's naturalization petition, the constitutional issues decided in *68 Filipinos*. We agree with Judge Lucas that under the guidelines adopted in *Parklane Hosiery*, "offensive collateral estoppel would not in any way be unfair to the government" in this case. Accordingly, we affirm the judgment granting Dr. Mendoza's petition for naturalization.

A.

The question of applying collateral estoppel offensively arises "when the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party." [4] *Parklane Hosiery*, 439 U.S. at 326 n.4, 99 S.Ct. at 649 n.4. *See also Blonder-Tongue*

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[4] In approving the use of collateral estoppel offensively, the Court in *Parklane Hosiery* sounded the death knell to the common law doctrine of mutuality of parties. Under the mutuality doctrine, one party could preclude another party from relitigating an issue that had been litigated in a previous suit only if both had been parties to the original action. Thus, under the mutuality doctrine, the government would not have been foreclosed in this case from relitigating issues decided adversely to it in *68 Filipinos* because Dr. Mendoza was not a party to that action.

Laboratories, Inc. v. *University of Illinois Foundation*, 402 U.S. 313, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971); *Montana* v. *United States*, 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979); *Hinkle Northwest, Inc.* v. *S.E.C.*, 641 F.2d 1304 (9th Cir. 1981).

Writing for the Court in *Parklane Hosiery*, Justice Stewart stressed the need for caution in using collateral estoppel offensively because of the risk of unfairness to a defendant. First, the availability of offensive collateral estoppel may encourage potential plaintiffs to sit on the sidelines, taking a no risk "wait and see" attitude in the hope that another plaintiff will obtain a favorable judgment that can be invoked offensively against the defendant. Second, a defendant with little at stake in the first action, and thus little incentive to defend vigorously or to appeal an adverse judgment, might find himself, in a subsequent unforeseen action involving higher stakes, estopped from relitigating an issue decided against him in the earlier action. Third, the offensive use of collateral estoppel raised the specter that a defendant faced with identical claims by multiple plaintiffs may prevail in several actions, then be faced with an inconsistent adverse judgment that can be used offensively by future plaintiffs. Finally, offensive use of collateral estoppel may be unfair where the defendant in the first action is forced to defend in an inconvenient forum or where the second action affords the defendant significant procedural opportunities not available in the first action.

Notwithstanding these acknowledged risks of unfairness to a defendant, the Court was persuaded that the dual purposes of collateral estoppel—"protecting litigants from the burden of relitigating an identical issue . . . and promoting judicial economy by prevent-

ing needless litigation," 439 U.S. at 326, 99 S.Ct. at 649—justified a rule permitting discretionary use of offensive collateral estoppel in the federal courts. Thus, the Court concluded that "[t]he preferable approach for dealing with these problems in the federal courts is not to preclude the offensive use of collateral estoppel, but to grant the trial courts broad discretion to determine when it should be applied." *Id.* at 331, 99 S.Ct. at 651. In exercising that discretion, trial judges should be guided by the general rule that "where a plaintiff could easily have joined in the earlier action, or where . . . the application of offensive collateral estoppel would be unfair to a defendant," *id.*, the defendant should be permitted to relitigate despite a prior adverse determination.[7]

B.

The government contends that the application of offensive collateral estoppel by Judge Lucas as a basis for granting Dr. Mendoza's petition was grossly unfair and an abuse of discretion.[8] To support this con-

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[7] In *Parklane Hosiery*, the district court refused to apply collateral estoppel offensively on grounds that it would deprive the defendant of its right to trial by jury. The Second Circuit reversed, applying collateral estoppel, and the Supreme Court affirmed. The Court reasoned, *inter alia*, that it was not unfair to collaterally estop Parklane Hosiery from relitigating, in a shareholders' class action, a determination in a prior action brought by the SEC that a proxy statement issued by Parklane Hosiery was false and misleading.

[8] As a preliminary matter, the government also argues that the facts of Dr. Mendoza's case are quite different from *68 Filipinos*, since Dr. Mendoza spent approximately six months in the United States and was therefore not in the Philippines during much of the time that Vice Consul Ennis' naturalization authority was revoked. It is impossible to tell from Judge

tention, the government focuses on the Solicitor General's decision to withdraw the appeal in *68 Filipinos*,[9] allowing the judgment in that case to become final. The government claims that it grossly underestimated the number of persons who would be eligible for naturalization under *68 Filipinos*, and that the appeal was withdrawn "without a complete understanding of the implications of [Judge Renfrew's] decision." With no citation to the record, the government claims that it appeared at the time it withdrew the appeal that only "a fairly small number" (some 25,000 Filipino veterans, by an unidentified State Department estimate, plus derivatively eligible relatives) would be eligible for naturalization under *68 Filipinos*. Brief for Respondent-Appellant at 22. The government goes on to contend, still without record support, that the Solicitor General, acting on unspecified "new information," later reversed his position and decided to perfect appeals in all subsequent cases, including Dr. Mendoza's. *Id.*

Renfrew's opinion the number of months that each Category II veteran in *68 Filipinos* was eligible for United States citizenship under the 1940 Act but was deprived of the opportunity to become naturalized because of the Commissioner's decision to withdraw the examiner from the Philippines. In any event, the record shows that Dr. Mendoza was in the Philippines for as much as three months, during which time he was eligible under sections 701-705 but unable to become naturalized because no naturalization examiner was present. We think this is a sufficient period to implicate his due process rights and to place him in the same situation as other Category II veterans.

[9] The Solicitor General, subject only to the general supervision and direction of the Attorney General, authorizes or declines to authorize the appeal of judgments adverse to the government. 28 C.F.R. § 0.20(b) (1980).

The government fails to provide any record support for its claim that offensive collateral estoppel was unfairly applied by Judge Lucas in granting Dr. Mendoza's petition. We are not advised of the source of or basis for the original State Department estimate of 25,000 eligible Filipino veterans; nor are we advised of the nature or source of the "new information" claimed to be the basis of the Solicitor General's change in position. All we have from the government is an unsupported claim that 60,000-80,000 Filipino veterans "may yet" seek naturalization under *68 Filipinos*.[10]

Even were we to accept the government's claim of error in its original estimate of eligible Filipino veterans, the new numbers of 60,000 to 80,000 give no meaningful indication of the consequences of barring relitigation of the issues decided in *68 Filipinos*. In basing its argument of unfairness on the number of persons eligible for naturalization under *68 Filipinos*, the government makes no distinction between those Filipino veterans who, like Dr. Mendoza, are likely to

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[10] "Yet the courts now invoke offensive collateral estoppel to hold that the Government is powerless to resist further petitions by Filipino war veterans who may yet number 60,000 to 80,000." Brief for Respondent-Appellant at 20. We assume, although the government does not tell us, that the figures of 60,000-80,000 are based on the INS research referred to by INS Commissioner Castillo in his 1978 testimony to Congress. *See* Slip op. p. 1395, p. ——, *infra; Hearings Before the Subcomm. on Immigration, Citizenship and International Law of the House Comm. on the Judiciary*, 95th Cong., 2nd Sess. 272-73 (1978). We note, moreover, that Commissioner Castillo gave no indication in his testimony that those figures were not available to the Solicitor General at the time he decided, on the recommendations of the INS, to withdraw the appeal in *68 Filipinos*.

petition for naturalization, and those who have remained in the Philippines and have no interest in leaving their homeland to become United States citizens. Indeed, what is most astonishing about the government's vision of a horde of Filipino veterans applying for citizenship in reliance on *68 Filipinos* is what the government has failed to tell us: how many persons have in fact petitioned for naturalization on the basis of *68 Filipinos* since the judgment became final in 1977. We are dealing with a class of persons who served in the Philippines Army some 40 years ago. Common sense tells us that the actual number likely to petition for naturalization in reliance on *68 Filipinos* is no more than a small fraction of the undocumented numbers cited by the government. In fact, this was the case as of 1978, when Leonel Castillo, then Commissioner of INS, testified before Congress:

> Our independent research indicates that if all of the veterans followed the same mortality rates and so on, that demographically there shouldn't be more than 60,000 to 80,000 *assuming they all wanted to come*. . . .
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> [*A*]*nd yet our experience in the aftermath of the 1968* [*sic*] *Filipino War Veterans case is that we've had fewer than 100 applicants, so there really has been no big change. The number has been very, very small.*

Heargings Before the Subcomm. on Immigration, Citizenship and International Law of the House Comm. on the Judiciary, 95th Cong., 2d Sess. 273 (1978) (emphasis added). Surely, if the number of petitioners had increased dramatically since 1978, the

government would have advised the court of that significant fact.

Moreover, whatever the government's original estimate of the number of eligible Filipino veterans, the government had every incentive to litigate vigorously the issues in *68 Filipinos* and to prosecute an appeal of the adverse trial court judgment. This is not a case where an original suit is followed by an unforeseen action involving much higher stakes. *See Parklane Hosiery*, 439 U.S. at 330, 99 S.Ct. at 651. On the contrary, in *68 Filipinos* the government faced 68 separate naturalization petitions joined together in one action, not a lone veteran seeking citizenship. It should have come as no surprise to the government that the effects of Judge Renfrew's decision would reach not only the 68 Filipinos before the court, but all similarly situated Filipino veterans, whatever their number.

It is not for this court to speculate on the reason the Solicitor General reversed his position after withdrawing the government's appeal in *68 Filipinos*. We have only the record before us to go on, and that record is bare of any support for the government's proffered explanation that it did not fully appreciate until a later time the implications of Judge Renfrew's decision. We thus conclude that the government had a full and fair opportunity to litigate the issues in *68 Filipinos* and that the government's decision to withdraw its appeal does not make it unfair to estop the government from relitigating the identical issues in an effort to defeat Dr. Mendoza's naturalization petition. *See United States* v. *Munsingwear*, 340 U.S. 36, 39, 71 S.Ct. 104, 106, 95 L.Ed 36 (1950); *Starker* v. *U.S.*, 602 F.2d 1341, 1349-50 (9th Cir. 1979); *Winters* v. *Lavine*, 574 F.2d 46, 62-63 (2nd Cir. 1978); *Continental Can Co.* v. *Marshall*, 603 F.2d

590, 596 (7th Cir. 1979); *Restatement* (Second) of Judgments § 68.1(a) Comment a (Tent. Draft No. 4, 1977).[11]

C.

We recognize that the Second Circuit in *Olegario*, *supra*, recently refused to estop the government from relitigating the constitutional issues decided in *68 Filipinos* and, disagreeing with Judge Renfrew, ruled in favor of the government on the merits.[12] We do not believe, however, that *Olegario* compels reversal of the trial court judgment granting Dr. Mendoza's naturalization petition.[13] As the Ninth Circuit has

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[11] Nor, under the guidelines of *Parklane Hosiery*, do we find other circumstances that warrant relitigation of the issues decided adversely to the government in *68 Filipinos*.

The record gives no indication that in 1975 Dr. Mendoza was aware of the *68 Filipinos* litigation and adopted a "wait and see" attitude in the hope of using a favorable decision as a basis for estopping the government from challenging his petition for naturalization. *See Parklane Hosiery*, 439 U.S. at 329-30, 99 S.Ct. at 650-51.

Furthermore, the government was not required to defend the *68 Filipinos* case in an inconvenient forum, and there are no significant procedural opportunities in this action that were not available in the earlier *68 Filipinos* action. *See id.*, 439 U.S. at 330-31, 99 S.Ct. at 651-52.

[12] The district court, apparently without considering collateral estoppel, had adopted Judge Renfrew's "able opinion" and granted Olegario's petition on the merits. 473 F.Supp. 185, 186 (S.D.N.Y. 1979).

[13] We note that *Olegario* was not decided until after Judge Lucas issued his order granting Dr. Mendoza's petition in this case; thus, Judge Lucas could not have considered *Olegario* in exercising his discretion to apply collateral estoppel offensively against the government. We find no abuse of discretion on the record before him, however, and conclude that the subsequent inconsistent decision does not require reversal.

recently noted, "[t]he fact of inconsistent decisions is a relevant, but not always dispositive, factor to be considered in the exercise of discretion." *Western Oil & Gas* v. *United States E.P.A.*, 633 F.2d 803, 809 (9th Cir. 1980). *See also Crawford* v. *Ranger Ins. Co.*, 653 F.2d 1248, 1251-52 (9th Cir. 1981).

Inconsistent judgments may render collateral estoppel unfair. In *Parklane Hosiery*, 439 U.S. at 330 n.14, 99 S.Ct. at 651 n.14, the Court recited Professor Currie's famous example of a railroad collision involving 50 passengers. Currie, *Mutuality of Estoppel: Limits of the Bernhard Doctrine*, 9 Stan.R.Rev. 281, 304 (1957). In that example, the railroad wins 25 suits, and a plaintiff wins suit 26. It would be unfair, of course, to estop the railroad in suits 27 through 50 on the basis of the apparently fortuitous jury decision in suit 26. Similarly, in *Commissioner* v. *Sunnen*, 333 U.S. 591, 599, 68 S.Ct. 715, 720, 92 L.Ed. 898 (1948), the Court reasoned that it would be unjust to give collateral estoppel effect to a judgment against taxpayer A in subsequent tax years, while similarly situated taxpayers, not collaterally estopped by the judgment against taxpayer A, are accorded more favorable tax treatment because of a change in the tax law.

In this case, there is only one inconsistent judgment, and the inconsistency stems from a conflict between the courts of two circuits, not from an apparently fortuitous jury decision or an intervening statutory change in the law.[14] Any unfairness oc-

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[14] **Moreover, *68 Filipinos* was litigated in the courts of the Ninth Circuit. Whatever the value of permitting another circuit to take a fresh look at the legal issue involved, thereby perhaps facilitating Supreme Court review, *see American Medical International Inc.* v. *Secretary of HEW*, —— F.2d**

casioned by application of collateral estoppel in this case is no greater than the unfairness that results whenever circuits disagree; thus, we do not believe that the existence of an inconsistent second circuit decision outweighs the factors favoring collateral estoppel in this case.

Moreover, we find the Second Circuit's reasoning unpersuasive on the collateral estoppel issue. The Second Circuit accepts, without analysis, the government's characterization of the case as one raising issues of national significance. ("In contrast to *Parklane*, the government is the defendant here, and the case raises important issues of national concern." 629 F.2d at 215.) We recognize that the government is frequently involved in cases raising issues of great public importance, and that in such cases the public interest in permitting the government to relitigate those issues may outweigh the public interest in avoiding needless litigation. We simply do not believe, as appears below, that this is such a case.

D.

The government's final line of argument is that *Parklane Hosiery* should be limited to private litigants. It is by now well settled, however, that collateral estoppel may be involved against the government, *see Montana* v. *United States*, 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979), and may be invoked not only on issues of fact, but on mixed issues of law and fact or pure issues of law. *See Montana* v. *U.S.*, *supra*; *Carr* v. *District of Columbia*, 646 F.2d

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——, at ——-—— No. 79-1460, slip op. at 10-11 (D.C.Cir. Aug. 14, 1981), we think these policies lose much of their force in a case brought in the same circuit as the initial litigation. *See Starker* v. *U.S.*, 602 F.2d at 1348-49 n.5.

599, 608 (D.C.Cir. 1980); *Starker* v. *U.S.*, 602 F.2d at 1344-48. Moreover, the Ninth Circuit has already approved the use of collateral estoppel offensively against the government. *Hinkle Northwest*, 641 F.2d at 1308-10; *Starker* v. *U.S.*, 602 F.2d at 1350.

Nonetheless, the Supreme Court has cautioned that "(u)nreflective invocation of collateral estoppel against parties with an ongoing interest in constitutional issues could freeze doctrine in areas of the law where responsiveness to changing patterns of conduct or social mores is critical." *Montana* v. *U.S.*, 440 U.S. at 163, 99 S.Ct. at 978. Similarly, courts have recognized that, as the institutionalized representative of the public interest, the government is sometimes involved in cases of far-reaching national significance, where the policies of conserving judicial resources and preventing parties from taking a "second bite of the apple" are outweighed by the societal interest in "getting a second opinion." *See American Medical International*, slip op. at 1393-1398; *Western Oil & Gas*, 633 F.2d at 809-10; *Porter & Dietsch Inc.* v. *FTC*, 605 F.2d 294, 299-300 (7th Cir. 1979), *cert. denied*, 445 U.S. 950, 100 S.Ct. 1597, 63 L.Ed.2d 784 (1980). The Restatement (Second) of Judgments, § 68.1(e) (Tent. Draft No. 4, 1977), for example, states that issue preclusion is inapplicable where "there is a clear and convincing need for a new determination of the issue (1) because of the potential adverse impact of the determination on the public interest. . . ."

We find no "critical" need for redetermination of the Filipino war veterans' rights. Despite the government's rhetoric, the record is devoid of evidence that Judge Renfrew's decision in *68 Filipinos* has had, or can be expected to have, any significant effect

on the number of veterans who become United States citizens.[15] Moreover, even if the number of Filipino veterans petitioning for naturalization on the basis of *68 Filipinos* were larger than the record would indicate, we can discern no compelling public interest in opposing the naturalization of those veterans. The persons who may take advantage of *68 Filipinos* are World War II veterans who are likely to be well over 60 years of age; they fought side-by-side with United States troops in the Pacific, and many, like Dr. Mendoza, suffered imprisonment by the Japanese and survived the notorious Bataan Death March. In appreciation for their sacrifices, Congress voted to admit those veterans to United States citizenship over 30 years ago. As former INS Commissioner Castillo observed in his testimony to Congress concerning the Solicitor General's decision to withdraw the appeal in *68 Filipinos:* '[i]t seem[s] . . . that just as a matter of simple justice, that we should honor our commitment to people that we agreed to naturalize thirty years ago." *Hearings Before the Subcomm. on Im-*

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[15] Moreover, it is a significant limiting factor that the "legal matter raised in the second proceeding . . . involve[s] the same set of events" as that involved in the first. *Commissioner* v. *Sunnen*, 333 U.S. 591, 601-602, 68 S.Ct. 715, 721-92, 92 L.Ed. 898 (1948); *see United States* v. *Moser*, 266 U.S. 236, 242, 45 S.Ct. 66, 67, 69 L.Ed. 262 (1924), *explained in Montana* v. *U.S.*, 440 U.S. at 162-63, 99 S.Ct. at 978. Both the facts giving rise to Dr. Mendoza's cause of action and the underlying claims are the same as those in *68 Filipinos*. While we therefore have no occasion to decide whether the government could be estopped from relitigating legal issues determined in *68 Filipinos* in a subsequent case involving a different cause of action, we note that factors favoring relitigation would assume greater weight in a new factual setting. *See Montana* v. *U.S.*, 440 U.S. at 162-63, 99 S.Ct. at 978.

migration, *Citizenship and International Law*, *supra*, at 272.

In light of the foregoing analysis, we hold that the district court did not abuse its discretion in estopping the government from relitigating, in opposition to Dr. Mendoza's petition for naturalization, the constitutional issues decided in *68 Filipinos*.

The judgment is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISRICT OF CALIFORNIA

Petition No. 406054

PETITION FOR NATURALIZATION
OF SERGIO ELEJAR MENDOZA

[Filed Jan. 4, 1979]

ORDER GRANTING PETITION

Petitioner is a citizen of the Philippines who served honorably in the Armed Forces of the United States from 1941 to 1946. His petition was filed under §§ 701 and 702 of the Naturalization Act of 1940 as amended in 1942. The government opposes the granting of this petition on the grounds that the rights petitioner possessed under the Act expired in 1946 when petitioner left the Armed Forces. As petitioner can make no valid claim for citizenship under law in force at the time he filed his petition, the government argues that his petition must be denied under 8 U.S.C. § 1421(e). Petitioner raises Constitutional arguments which he submits allow him to make this petition under the 1942 Amendments. For the reason stated below the Court grants the petition on other grounds and does not reach the Constitutional issues or other merits of the petition.

Matter of Naturalization of 68 Filipino War Vetrans, 406 F.Supp. 931 (N.D. Ca., 1975) involved

three categories of veterans asserting rights under the 1942 Amendments. Petitioner's position is the same as those petitioners in "Category II" in *68 Filipino War Veterans*. That is, petitioner served in the United States Armed Forces in the Philippines during the time when the United States government withdrew the authority of the INS special agent there to naturalize petitioners under the 1942 Amendments. The District Judge in *68 Filipino War Veterans* found that the Category II petitions should be granted. This Court holds that the policy of offensive collateral estoppel as recently refined by the Supreme Court in *Parklane Hosiery Co., Inc.* v. *Shore*, 99 S.Ct. 645 (1979) is apposite and will be applied to estop the government from challenging the petition here.

Although plaintiff probably could have joined as a petitioner in *68 Filipino War Veterans*, his failure to do so is not suggested to have been the result of collusion, bad faith, or other improper motive. Indeed, it has not been suggested that petitioner was aware of the suit at all. Thus it would not be unfair to allow petitioner to make use of that decision. Second, the government surely had as much incentive to litigate the issues in *68 Filipino War Veterans* as in this case. The government has not pointed to any factor indicating that it did not litigate that case fully. Third, the use of offensive collateral estoppel here will not produce a decision inconsistent with other judgments. In fact, the decision here will square not only with *68 Filipino War Veterans* but with the decision of Chief Judge Schwartz in *Petition of Crispulo Columna Colmenar*, Pet. No. 308-P-22551, (S.D. Ca., 20 March 1979). Finally no procedural advantages are available to the government in this case that were unavailable in *68 Filipino War Veterans*. In sum, offensive

collateral estoppel would not in any way be unfair to the government.

Under the guidance of *Parklane Hosiery*, then, the Court holds that the government is estopped from challenging this petition by the decision in *Matter of Naturalization of 68 Filipino War Veterans* and, accordingly, the petition is granted.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk of the Court serve copies of this Order on counsel of record in this action.

Dated: June 4, 1979

/s/ Malcolm M. Lucas
MALCOLM M. LUCAS
United States District Judge

APPENDIX C

THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

Petition No. 406054

PETITION FOR NATURALIZATION
OF SERGIO ELEJAR MENDOZA

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATIONS OF THE DESIGNATED NATURALIZATION EXAMINER

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA:

I

The undersigned, duly designated under the Immigration and Nationality Act to conduct preliminary examination upon petitions for naturalization, respectfully submits that the above named petitioner, a native and national of the Philippines, age 70 years, presently in the United States in the status of overstayed visitor for business, filed the petition for naturalization numbered above on May 10, 1978, under Section 701 of the Nationality Act of 1940, as amended (Act of March 27, 1942 (56 Stat. 182)).

The question presented is whether the petitioner is now eligible to be naturalized under the statute cited above relating to service in the Armed Forces of the United States during World War II, and which statute expired by its own terms on December 31, 1946.

II

The petitioner served honorably in the Armed Forces of the United States from December 1, 1941 to June 30, 1946. His service was with the Philippine Commonwealth Army and he enlisted in the Philippines. Petitioner was never lawfully admitted to the United States for permanent residence. Verification of his service and its honorable character has been obtained from official records.

The petitioner herein has offered no evidence to establish that he attempted to apply for or even inquired about naturalization prior to the expiration of the law on December 31, 1946. Further, petitioner has testified that he left the Philippines in September, 1945 for the United States to go to school under United States Army authority, and did not return to the Philippines until at least June, 1946.

There are no other issues, such as good moral character or attachment to the principles of our constitution, in this case. The sole issue is eligibility for naturalization under the provisions of the Nationality Act of 1940, as amended (supra), and under the current Immigration and Nationality Act, Section 329 (8 U.S.C. 1440).

Section 701 of the Act of March 27, 1942 sought to reward through naturalization, those *who were then serving* or who had served honorably on active duty with the Armed Forces of the United States. Section 702 of that Act (56 Stat. 183) provided for the overseas naturalization of those then serving. The provisions of Sections 701 and 702 expired on December 31, 1946. During the period, designated government officials traveled to various parts of the world to examine applicants and actually confer naturalization administratively. This was the first of only two

times during our nation's history that such administrative procedures were available. The Philippines was among the overseas locations visited by those officers following the recovery of those Islands by friendly forces. However, on the representations of Philippine officials, the government official was withdrawn for a period of approximately nine months, from late 1945 to mid 1946. Such a situation did not occur elsewhere. Thus, for this period, naturalization was not available to qualified servicemen then *in the Philippines*.

III

Section 701 of the Act of March 27, 1942 called only for honorable services in the United States Armed Forces and did not require, as does its current successor statute, Section 329 of the Immigration and Nationality Act (8 U.S.C. 1440), that the serviceman be enlisted in a qualifying geographic area or that he have been at any time lawfully admitted to the United States for permanent residence. Those geographically qualifying areas are the United States, the Canal Zone, American Samoa and Swains Island. Most, if not all, of the Filipino nationals had either enlisted in the Philippines in such units as the Philippine Scouts (part of the United Armed Forces) or being members of the Commonwealth Army of the Philippines had been incorporated by executive and military orders into the United States Armed Forces. Others served in guerrilla units recognized by the United States Armed Forces.

Within recent years, the situation of another Filipino native and veteran of World War II was considered by the United States Supreme Court (*INS* v. *Marciano Haw Hibi*, 414 U.S. 5 (1973)). In *Hibi*,

the Supreme Court considered the petitioner's argument that the government was estopped from using the cut-off date of December 31, 1946 as spelled out in Section 701 of the 1940 Act since the government, by withdrawing its examiner from the Philippines for a period of several months, had effectively denied Filipino veterans the opportunity to apply at that time. Hibi had not applied nor tried to apply prior to December 31, 1946. The Supreme Court was not persuaded by that argument.

In a split decision, the Court ruled that, since Hibi had not applied for naturalization until many years after 1946, the withdrawal of the examiner did not rise to the level of "affirmative misconduct" required to successfully invoke estoppel against the government. Even though the Court concluded that naturalization under Section 701 was no longer available to Hibi on the issue of estoppel, there was no hint of what the decision might have been had Hibi attempted to apply before that section's expiration.

Subsequently, a number of Filipino World War II veterans residing in San Francisco, California filed petitions for naturalization claiming eligibility under the same provision. Their petitions were joined and, notwithstanding the Supreme Court's decision in *Hibi*, the United States District Court found the majority of the 68 Filipinos eligible for naturalization under Section 701 of the Nationality Act, as amended. *See Matter of Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931 (N.D. Cal. 1975).

This Court will note that the San Francisco Court divided the 68 petitioners into three categories. In the first category were those veterans who proved to the Court that they had applied or made a reasonable effort to apply before December 31, 1946 but were

denied the opportunity to file formal petitions because of the government's withdrawal of its overseas officer. The Court, distinguishing *Hibi*, found that these persons had "constructively" filed petitions and that the government was estopped, notwithstanding *Hibi*, from now denying them naturalization.

In the second category were those veterans who convinced the Court that they would have applied had the officer not been withdrawn. These persons, like Hibi, took no steps to apply until many years later. With respect to these, the Court found that the veterans had been denied due process, an issue not raised or decided in *Hibi*. It reasoned that, since Filipinos were, before July 4, 1946, non-citizen nationals of the United States, they owed permanent allegiance to the United States. In turn, they were entitled to due process.

Finally, the third category included several Filipinos who could not produce the critical proof of qualifying honorable and active service in the United States Armed Forces during the World War II period. The Court gave this group additional time within which to produce that proof. Evidence was not forthcoming and the petitions of those in the third category were dismissed.

As to categories one and two, the government sought appeal. The appeal was grounded primarily on the fact that the petitioners' cases were not essentially distinguishable from that in *Hibi*. Briefing was completed and the appeal was awaiting oral argument in the Ninth Circuit Court of Appeals.

In a memorandum dated September 21, 1977, the Commissioner of the Immigration and Naturalization Service recommended to the Department of Justice that the appeal be withdrawn. Officials at the De-

partment of Justice agreed and in an order dated November 30, 1977 the Court of Appeals granted the government's motion to dismiss. The order made no comment one way or the other on the merits of the case(s).

Upon reexamination, the government has adopted the reasoning of the San Francisco Court only as to Filipino World War II veterans in the first category.

It is however the government's position that the naturalization of those veterans in the second category is unsupported by statute and precedent. Notwithstanding the decision in the San Francisco case, notwithstanding the government's withdrawal of its appeal in that case, and for the following reasons, the government must recommend that this petition for naturalization be denied.

The current Immigration and Nationality Act of 1952 was amended by the Act of September 26, 1961, Sec. 17 (75 Stat. 656). Specifically, Section 310 of the 1952 Act was amended by the addition of Subsection (e) thereof (8 U.S.C. 1421(e)). The amendment provided that, notwithstanding the savings clause of the Act, all petitions for naturalization filed after the effective date of the amendment would be determined in accordance with the requirements of the 1952 Act still in effect. As indicated earlier, the basic and current Act requires, under Section 329 (8 U.S.C. 1440), that qualified servicemen or veterans must have enlisted (or reenlisted, by judicial interpretation) in certain geographical areas or have been admitted to the United States for lawful permanent residence.

The District Court, in the cases of the 68 veterans, did not discuss Section 310(e) in reaching its conclusion as to either categories one or two. If category one veterans are determined to have "construc-

tively filed" their petitions in 1946, Section 310(e) does not apply, and the savings clause, Section 405(b) (8 U.S.C. 1101 note), would allow their petitions to be heard and determined in accordance with the requirements of law in effect when such petitions were filed.

The present petitioner, however, made no attempt to inquire or apply until well after the enactment of Section 310(e), and as such is bound by the requirements of the present statute (8 U.S.C. 1440). Since he was neither enlisted nor inducted in the qualifying geographical area outlined above and is not a lawful permanent resident, the requirement is not met. Further, during a large majority of the time when authority to naturalize in the Philippines was revoked (October, 1945 until August, 1946), petitioner was either in the United States as a student officer under United States Army authority, or in transit back to the Philippines.

Interestingly, in a decision dated October 17, 1975, just over three weeks prior to the District Court's judgment in the cases of the 68 Filipino veterans, the Ninth Circuit Court of Appeals ruled that Section 310(e) of the Act (supra) barred the naturalization of a veteran whose eligibility was claimed on the basis of the provisions of a prior statute, *United States* v. *Pasion*, 524 F.2d 249 (9th Cir. 1975).

Further, the situation of category two veterans is indeed indistinguishable from that in *Hibi* (supra). Since no attempt was made to inquire or apply prior to December 31, 1946, the government's failure to have an examiner in the Philippines did not amount to the "affirmative misconduct" necessary to invoke estoppel, nor was it a denial of due process.

Thus it is the position of the government that naturalization under Section 701 of the Nationality Act of 1940 is not available to a Filipino World War II veteran who cannot prove that he made a reasonable inquiry or application prior to the expiration of the above section on December 31, 1946.

Pursuant to the provisions of Section 335 of the Immigration and Nationality Act (8 U.S.C. 1446), I hereby make the following findings of fact and conclusions of law:

FINDINGS OF FACT:

(a) The petitioner filed a petition for naturalization on May 10, 1978 under the provisions of Section 701 of the Nationality Act of 1940 as amended;

(b) The petitioner is a Filipino national who served honorably on active duty with Armed Forces of the United States from December 1, 1941 to June 30, 1946 by reason of his service in the Philippine Commonwealth Army during that period; he was enlisted in the Philippines;

(c) The petitioner was either in the United States as a student officer under United States Army authority or in transit back to the Philippines during a large majority of the time when authority to naturalize in the Philippines was revoked;

(d) The petitioner is not a lawful permanent resident of the United States;

(e) The petitioner has offered no evidence to show that he inquired about naturalization or applied for naturalization prior to December 31, 1946.

CONCLUSION OF LAW:

(a) The petitioner is ineligible for naturalization under the provisions of Section 701 of the Nationality Act of 1940 as amended because of the decision of the United States Supreme Court in *INS* v. *Hibi*, 414 U.S. 5 (1973), and because of current Section 310(e) of the Immigration and Nationality Act, as amended (8 U.S.C. 1421(e)), notwithstanding the decision of the United States District Court, San Francisco, California in *Matter of Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931 (N.D. Cal. 1975).

V

I recommend that this petition for naturalization be DENIED pursuant to the facts and law outlined above.

Respectfully submitted,

/s/ John B. Bartos
JOHN B. BARTOS
General Attorney (Nationality)
Designated Naturalization Examiner

Nov. 29, 1978

Date

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 79-3478

MISC #7783 MML

IN THE MATTER OF PETITION FOR NATURALIZATION OF SERGIO ELEJAR MENDOZA, PETITIONER-APPELLEE

vs.

UNITED STATES OF AMERICA, RESPONDENT-APPELLANT

Appeal from the United States District Court
for the Central District of California

JUDGMENT

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

A TRUE COPY
ATTEST Oct. 22, 1982
PHILLIP B. WINBERRY
Clerk of Court

by /s/ Oscar Tagle
Deputy Clerk

Filed and entered April 2, 1982

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 79-3478

IN THE MATTER OF PETITION FOR NATURALIZATION OF SERGIO ELEJAR MENDOZA, PETITIONER-APPELLEE

v.

UNITED STATES OF AMERICA, RESPONDENT-APPELLANT

[Filed Jul. 22, 1982]

Before: TANG and NORRIS, Circuit Judges; and CARROLL,* District Judge

ORDER

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P.35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

---

* The Honorable Earl H. Carroll, United States District Judge for the District of Arizona, sitting by designation.

APPENDIX F

Sep. 21, 1977

To: Philip Wilens, Chief
Government Regulations and
Labor Section Criminal Division,
Department of Justice

From: Leonel J. Castillo, Commissioner
Immigration and Naturalization Service

Subject: In the Matter of Petitions for Naturalization of 68 Filipino War Veterans Pursuant to Sections 701-702, Nationality Act of 1940, 406 F. Supp. 931 (N.D. Cal. 1975); Appeal filed January 9, 1976

INTRODUCTION

The Commissioner has reviewed the decision of the District Court and wishes to withdraw the Service recommendation that the case be appealed.

BACKGROUND

The petitioners are Filipino veterans of World War II who would have been eligible for naturalization under special World War II legislation that expired on December 31, 1946. Section 701 of the Nationality Act of 1940, 56 Stat. 182 *et seq.*, as amended, 8 U.S.C. 1001 (1940 ed supp. V) exempted alien servicemen who served outside the continental limits of the United States from certain of the usual requirements for naturalization, including those of a period of residence in the United States and literacy in English. Section 702 provided for the naturalization overseas

of persons eligible for naturalization under section 701 who, while serving honorably in the U.S. military, were not within the jurisdiction of any court authorized to naturalize aliens.

At the request of the Philippine Government, which feared a mass exodus, the Service had withdrawn naturalization facilities from the Philippines during a nine-month period before the statute expired. Eight of the petitioners in this case (Category I) had submitted timely applications to the Service in the Philippines, only to have them rejected. Fifty-three petitioners (Category II) were unaware of their eligibility before the law expired. The seven petitioners in Category III were in the same position as those in Category II, except that they had not shown that they served in the United States armed forces as required by section 701.

Section 310(e) of the Immigration and Nationality Act, 8 U.S.C. 1421(e) requires all petitions for naturalization filed after the enactment of that section (September 26, 1961) to be heard and determined in accordance with the requirements of that Act. Section 329 of the Act, 8 U.S.C. 1440 presently regulates the naturalization of aliens on the basis of active duty service in the armed forces of the United States. That section provides for the summary naturalization of an alien who served in the armed forces before December 31, 1946, if ". . . (2) at any time subsequent to enlistment or induction such person shall have been lawfully admitted to the United States for permanent residence." 8 U.S.C. 1440(a)(2). None of the petitioners in the case at bar have been admitted for permanent residence. Further, they cannot obtain that status because the immigration quota for their country is oversubscribed.

DISTRICT COURT DECISION

In *United States Immigration and Naturalization Service* v. *Hibi*, 414 U.S. 5 (1973), the Supreme Court held that the principle of estoppel is not applicable against the Government to enable a Philippine national whose right to petition for U.S. citizenship expired in 1946 to now apply for such citizenship under the provisions of the Nationality Act of 1940. *Hibi* claimed estoppel on the ground that during the time in question the American authorities did not adequately publicize the rights accorded under the Act of 1940 and did not have available an authorized naturalization representative in the Philippine Islands during all the time those rights were available. The Supreme Court rejected the claim, ruling that estoppel against the Government could be premised only on affirmative misconduct of its officials. The District Court, however, held that the rejection of the Category I applications constituted "affirmative misconduct" within the meaning of *Hibi*, and concluded that this estops the Service from raising the expiration of the World War II special legislation. The District Court found that since all the Category I petitioners had filed the appropriate forms for commencing naturalization proceedings, they would be deemed to have constructively filed petitions for naturalization within the required time. *In re Vacontios' Petition*, 155 F. Supp. 427 (S.D.N.Y. 1957).

As to the Category II petitioners, the District Court held that the Service's discrimination against eligible veterans in the Philippines, while making naturalization facilities available to eligible veterans elsewhere, constituted a denial of equal protection of the laws and of due process forbidden by the Constitution.

The petitioners in Category III, having failed to produce the necessary proof of their military service within 90 days from the date of the court's order, had their petitions denied on April 1, 1976.

GOVERNMENT'S ARGUMENT

The Government presented four principal reasons why the petitions should be denied:

(1) that the *Hibi* decision by the Supreme Court was *res judicata* against the application of the doctrine of estoppel on grounds of failure to maintain a naturalization examiner in the Philippines between October 1945 and August 1946. The court reasoned, however, that since *Hibi* was a summary reversal limited to the estoppel issue, it had less precedential value than an opinion on the merits. Further, since the constitutional claim raised here was neither presented to nor considered by the Supreme Court, *Hibi* does not bar petitioners from raising the constitutional claim.

(2) that due process rights did not apply in the Philippines after the March 24, 1934 Philippine Independence Act because the Philippines was a territory, and not a part, of the United States. The court found that the Act did not transform the Philippines into a foreign country into which the guarantees of the Constitution did not penetrate, notwithstanding the fact that the Philippines was treated as a foreign country for limited purposes (e.g., immigration, tariffs on products). Filipinos were not aliens resident in a foreign country. Owing allegiance to the United States (48 Stat. 456 § 2(a)(I)), they were nationals entitled to claim the protection of the fundamental guarantees of the United States Constitution

for events occurring prior to the Philippine Independence on July 4, 1946.

(3) that the decision to honor the request of the Philippine Government was a matter of foreign relations policy, an executive function not reviewable by the courts. While conceding that the Government's decision was motivated by foreign policy considerations, the court, relying on *Baker* v. *Carr*, 369 U.S. 186 (1962), found that this case presents a justiciable question.

(4) that the nine-month absence of the naturalization examiner did not deny petitioners due process of law. Petitioners argued that the Commissioner's decision to withhold from servicemen stationed in the Philippines the opportunity to become naturalized discriminated against the Filipinos as a class. As the only class forced to suffer such discrimination, petitioners contended that they were denied equal protection of the laws. This equal protection claim is based on the principle that the unequal application of a law among those entitled to be treated alike may violate the Due Process Clause of the Fifth Amendment. Petitioners also claimed that the discrimination was based on race, alienage, or nationality—suspect classifications—which must be subjected to strict judicial scrutiny and can only be justified by compelling government interest. In order to justify the use of a suspect classification, the Government must show that "its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary * * * to the accomplishment' of its purpose or the safeguarding of its interest *In re Griffiths*, 413 U.S. 717, at 721-722. The court found, however, that the Government failed to show a compelling national interest to justify withdrawing

the naturalization examiner from the Philippines while summary overseas naturalization of alien veterans was taking place during that period in other countries.

DISCUSSION

When the Congress enacted the provisions of section 701-705, it was aware of the number of persons who would be entitled to receive the benefits. Certainly the Filipinos were intended to be among the major beneficiaries of these provisions since there were more Filipino servicemen in the U.S. armed forces than any other ethnic group. The "national interest" was expressed by Congress in the enactment of this legislation providing for the naturalization of all qualified war veterans. The actions taken by the Service not only failed to further the intent of Congress but appear to have been wholly inconsistent with it.

The desire expressed by the Philippine Government in 1945 to hold onto its younger manpower in the post-war period is hardly valid any longer. "The Court does not believe that Filipino-American relations in particular, or the foreign policy of the United States in general, are likely to be affected adversely by judicial consideration of the merits of the instant case. As the Government repeatedly called to the attention of the Court the executive action complained of here occurred nearly thirty years ago and reflected decisions based upon fact and policy objectives then existent. The Court does not perceive any reason why it must continue to adhere unquestionably to these much earlier executive decisions." 406 F. Supp. 931, 947.

The Service withdrew its naturalization facilities from the Philippines and from no other area where

alien servicemen were on active duty in the armed forces of the United States. Since the decision by the District Court concerns only Filipino veterans of World War II, it will not be a precedent for future litigation.

The essence of due process is fundamental fairness. It is grossly unfair of the Government to raise the barrier of 8 U.S.C. 1421(e) (which requires naturalization petitions to be determined in accordance with the current Immigration and Nationality Act) to bar the naturalization of these war veterans when it was the Government itself which prevented them from applying at a time when there was no such barrier.

A relatively low number of Filipino nationals are affected by the decision. While there are some 25,000 certifiable veterans residing in the Philippines, it is unlikely that most of them would come to the United States at this late stage in their lives. Since the fall of Saigon in 1975, the United States has admitted 145,000 Indochinese under the emergency parole authority extended to the Attorney General. The President and the Commissioner have pledged themselves to a course of compassion and amnesty. The withdrawal of the Government's appeal in this case would be in keeping with the policy of the Administration.

FOR THE COMMISSIONER

David Crosland
General Counsel

APPENDIX G

STATUTES AND REGULATION INVOLVED

1. 28 C.F.R. 0.20 provides in pertinent part:

> The following-described matters are assigned to, and shall be conducted, handled, or supervised by the Solicitor General, in consultation with each agency or official concerned:
>
> * * * * *
>
> (b) Determining whether, and to what extent, appeals will be taken by the Government to all appellate courts (including petitions for rehearing *en banc* and petitions to such courts for the issuance of the extraordinary writs) * * *.

2. Sections 701, 702, and 705 of the Nationality Act of 1940, as amended, ch. 199, 56 Stat. 182-183, 8 U.S.C. (Supp. V 1945) 1001, 1002 and 1005, provided in pertinent part: [1]

> Sec. 701. * * * [A]ny person not a citizen regardless of age, who has served or hereafter serves honorably in the military or naval forces of the United States during the present war and Who shall have been at the time of his enlistment or induction a resident thereof and who (a) was lawfully admitted into the United States, including its Territories and possessions, or (b) having entered the United States, including its Territories and possessions, prior to September 1, 1943, being unable to establish lawful admission

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[1] The Nationality Act of 1940 was repealed by Section 403(a)(42) of the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 280.

into the United States serves honorably in such forces beyond the continental limits of the United States or has so served may be naturalized upon compliance with all the requirements of the naturalization laws except that (1) no declaration of intention, no certificate of arrival for those described in group (b) hereof, and no period of residence within the United States or any State shall be required; (2) the petition for naturalization may be filed in any court having naturalization jurisdiction regardless of the residence of the petitioner; (3) the petitioner shall not be required to speak the English language, sign his petition in his own handwriting, or meet any educational test; * * * *Provided, however,* That * * * (3) the petition shall be filed not later than December 31, 1976. * * *

Sec. 702. During the present war, any person entitled to naturalization under Section 701 of this Act, who while serving honorably in the military * * * forces of the United States is not within the jurisdiction of any court authorized to naturalize aliens, may be naturalized in accordance with all the applicable provisions of section 701 without appearing before a naturalization court. The petition for naturalization of any petitioner under this section shall be made and sworn to before, and filed with, a representative of the Immigration and Naturalization Service designated by the Commissioner or a Deputy Commissioner, which designated representative is hereby authorized to receive such petition in behalf of the Service, to conduct hearings thereon, to take testimony concerning any matter touching or in any way affecting the admissibility of

any such petitioner for naturalization, to call witnesses, to administer oaths, including the oath of the petitioner and his witnesses to the petition for naturalization and the oath of renunciation and allegiance prescribed by section 335 of this Act, and to grant naturalization, and to issue certificates of citizenship; * * *.

Sec. 705. The Commissioner, with the approval of the Attorney General, shall prescribe and furnish such forms and shall make such rules and regulations, as may be necessary to carry into effect the provisions of this Act.

3. Section 310(e) of the Immigration and Nationality Act of 1952, as added, Pub. L. No. 87-301, 75 Stat. 656, 8 U.S.C. 1421(e), provides:

Notwithstanding the provisions of section 405(a)[2] any petition for naturalization filed on or after September 21, 1961, shall be heard and determined in accordance with the requirements of this subchapter.

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[2] Section 405(a) of the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 280, was a general savings clause that preserved the legal effectiveness of certain acts taken under provisions of prior law that were in other respects superseded by the 1952 Act.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1962 884442 1150

Office - Supreme Court, U.S.
FILED
DEC 27 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-849

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

SERGIO ELEJAR MENDOZA, RESPONDENT

BRIEF OF RESPONDENT IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the Court of Appeals properly ruled that the United States was collaterally estopped from relitigating a question of constitutional law by the judgment of a district court in a prior case, involving the same subject matter, in which the question was resolved adversely to the United States and in which the United States voluntarily withdrew its appeal.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-849

UNITED STATES OF AMERICA, PETITIONER

v.

SERGIO ELEJAR MENDOZA

BRIEF IN RESPONSE TO
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REASONS FOR DENYING THE PETITION

SUMMARY OF ARGUMENT

The heart of the government's case is that it should be allowed to relitigate the respondent's naturalization petition because of special circumstances that set it apart from private litigants.

Respondent agrees that governmental interest in administration of the laws may at times

militate against the application of collateral estoppel. But what the government wants is an absolute rule to the effect that it may never be collaterally estopped from relitigating an issue of law, a proposition that is contrary to precedent and that would forever deprive the judiciary of the authority to estop the government no matter how aggravated the circumstances.

Rare and exceptional as they may be, there are instances in which the courts should be able to exercise that power in the interests of justice. This case, for the following reasons, is one of them.

1. The recent decision of this Court in Montana v. United States, 440 U.S., 147 (1979), which is fully applicable to this case, shows that the government can be collaterally estopped from relitigating issues of law,

even issues of constitutional law.

2. To justify relitigation, the government must show that estopping it would be unfair. Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979). The government cannot do so here because it had a full and fair opportunity to litigate the underlying issue once before, and has shown no overriding public interest against the naturalization of Filipino war veterans like Dr. Mendoza.

3. If the government were allowed to relitigate the merits of the veterans' claims, the result would be the creation of two separate classes of veterans. The first consists of those who were naturalized with the government's blessing when it withdrew its appeal in Matter of Naturalization of 68 Filipino War Veterans,

406 F. Supp. 931 (N.D. Cal. 1975), appeal withdrawn, No. 78-1832, (9th Cir. 1977), (hereinafter "68 Veterans"). The second includes those like Dr. Mendoza who continue to encounter the government's opposition even though their claims are founded on virtually the same facts and circumstances. Such unequal application of the law should be discouraged.

4. The decision below is founded upon the unique facts and circumstances of this case, which will never happen again. Consequently, the decision below will have negligable, if any, value as precedent and will not preclude the government from escaping the impact of collateral estoppel in another case involving other circumstances. Nor will it inhibit the Solicitor General from following the traditional policy of his

office with respect to the selective prosecution of appeals.

5. Contrary to the government's position, the decision in Olegario v. United States, 473 F. Supp. 185, rev'd., 629 F. 2d 204, cert. denied, 450 U.S. 980, a judgment in the government's favor, did not compel the court below to permit a relitigation of the merits in this case.

ARGUMENT

I

It is now well established that the government may be collaterally estopped in civil litigation even when an issue of constitutional law is at stake. In Montana v. United States, 440 U.S. 147 (1979), this Court precluded the government from relitigating the issue whether a state tax unconstitutionally discriminated against the federal government.

Nonetheless, the government points to

Montana for the proposition that powerful considerations militate against application of estoppel to purely legal issues, particularly issues of constitutional import. See Petition at 17. However, the language in Montana to which the government refers provides only that precluding relitigation of legal issues may be inappropriate when there are successive actions which involve "unrelated subject matter." 440 U.S. at 162. The rationale for this admonition was that it would be undesirable to allow preclusion to freeze the development of the law when "responsiveness to changing patterns of conduct or social mores" are more important. Id. at 163. But, as the Court explained, there is nothing inappropriate about prohibiting a relitigation of legal issues when the successive cases are "closely aligned in time and subject matter." Id. In fact,

it was because there was no significant difference in the two cases in Montana that the Court exhibited no reluctance in upholding the estoppel.

In this case, of course, Dr. Mendoza's naturalization application and those in question in 68 Veterans involve the very same time and subject matter. Thus, there is no reason to fear that preclusion will freeze the law in a posture that will make it unresponsive to changing patterns in society. Hence, estoppel is appropriate in this case.

The government's citation to Standefer v. United States, 447 U.S. 10 (1980), on pages 17-18 of the Petition, is inappropriate. Standefer was a criminal case and the Court's denial of estoppel was motivated largely by the concern that, in criminal litigation, the government may not have had a full opportunity to develop its case in prior litigation and, indeed, is even prohibited from challenging

a defendant's acquittal on appeal. As Standefer itself recognizes, Id. at 24, these circumstances do not apply to civil litigation like Dr. Mendoza's case. Unlike the obstacles encountered in Standefer, the government had every opportunity to present its case in 68 Veterans and to pursue its appeal from the district court's judgment. Moreover, as discussed in the succeeding section, there is no overriding public interest against the naturalization of Dr. Mendoza, and other veterans who are still able to apply, that is parallel to the deep public interest in the enforcement of the criminal law that rightly influenced this Court in Standefer.

II

In INS v. Hibi, 414 U.S. 5 (1973), the government told this court that permitting Hibi's naturalization would flood the country with claims for naturalization

by Filipino war veterans like Hibi himself. The government continued to express the very same fears at both the trial and appellate stages of 68 Veterans. 1/

Thus, the government was acutely aware that, if the district court opinion in 68 Veterans were allowed to stand, other veterans like Dr. Mendoza would naturally consider it a signal to apply for naturalization themselves. Beyond a doubt, the government's knowledge of that fact gave it every incentive to fully and vigorously pursue its appeal in 68 Veterans just as it fully and vigorously participated in the case at the district court level. As the government itself readily admits, it withdrew the appeal only after due and

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1/ See Petition for a Writ of Certiorari, U.S. INS v. Hibi, No. 72-1652, at 16-18, and the government's brief in U.S. v. 68 Filipino War Veterans, 9th Cir. No. 78-1832 at 19.

careful deliberation of all of the relevant considerations including its turnabout conclusion that the district court's decision "would not affect significant numbers of individuals" after all. 2/ See Petition at 11. Thus, it would fly in the face of reality to suggest that the government did not have a full and fair opportunity to litigate the issues.

In Parklane Hosiery v. Shore, 439 U.S. 322 (1979), this Court held that a party to a prior lawsuit may be precluded in a later case from relitigating an issue decided in the prior suit unless the

2/ The government also notes that it did not consider the district court's opinion as binding precedent. The only significance of that position would be that the government still entertained the possibility of contesting other applications in other courts. But if the government really thought at the time that it might contest other applications, the withdrawal of its appeal in 68 Veterans is certainly illogical, inconsistent, and puzzling.

application of collateral estoppel would be unfair to that party. As can be seen from the history of this litigation and the government's own admission that it withdrew the appeal in 68 Veterans after full and deliberate consideration, the government has always acted with complete awareness of the circumstances. Thus, it cannot now be heard to say that preclusion is unfair. 3/

While the government can and should be collaterally estopped when it would not be unfair to do so, it is not totally like the private litigant either. The court below recognized this when it declared

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3/ The government suggests that the fact that Dr. Mendoza spent six months in the United States in 1945-46 distinguishes his case from 68 Veterans. See Petition at 25-26. This is not so. A basic argument in 68 Veterans was that, if the special naturalization examiner had not been withdrawn from the Philippines, qualifying veterans would have had the means to exercise their opportunity to apply for naturalization. Dr. Mendoza is in this class of veterans because, if the examiner had not been

that

> courts have recognized that, as the institutionalized representative of the public interest, the government is sometimes involved in cases of far-reaching national significance, where the policies of conserving judicial resources and preventing parties from taking a 'second bite of the apple' are outweighed by societal interest in 'getting a second opinion.'

See Petition, Appendix A, at 19a.

Obviously, the government does have a generalized interest in the enforcement of our naturalization laws. However, in the context of this case, there is no societal interest that compels or even suggests a relitigation of the legal issues. This is because the case involves events which occurred some 37 years ago, events which will never happen again, and which, there-

---

withdrawn, he also would have had the means to apply for naturalization when he was in the Philippines. Thus, he was injured by the withdrawal in the same way as the petitioners in 68 Veterans. The court below swiftly reached this simple conclusion. See Petition, Appendix A at 11a n. 8.

fore, will have no significant effect upon anyone other than a handful of aging veterans of World War II who, even by the government's own reckoning, were deprived of a chance to become American citizens nearly four decades ago.

III

It is apparent that the government had a full and fair opportunity to litigate the issues in 68 Veterans. It is also apparent that the government voluntarily withdrew the appeal in 68 Veterans quite freely and after full deliberation. Moreover, by withdrawing the appeal, the government conceded the validity of the district court's judgment. Now, in this case, the government wishes to repudiate its position even though circumstances remain unchanged, issues are identical, and Dr. Mendoza relied upon the judgment in 68 Veterans.

Nonetheless, to this day, the government has given no explanation for its decision to oppose further naturalization of other Filipino war veterans. The government says only that, after "thorough reexamination," the Justice Department changed its mind. See Petition for Certiorari at 12.

The practical and legal results of the government's present position are strikingly unfair. Two classes of war veterans are created: the first consists of those veterans who filed their naturalization applications before the voluntary dismissal of the appeal in 68 Veterans and who are now enjoying the benefits of their long overdue citizenship. The second includes those veterans whose circumstances are indistinguishable from the first group, but who continue to encounter the government's

determined opposition to their naturalization and who face eventual deportation if their fight is lost.

Thus, the government not only abuses, for no rational reason, the integrity of a judgment to which it had previously conceded, but would also be the direct cause of an unequal application of the naturalization law and the creator of different rules for persons in identical circumstances.

Dr. Mendoza submits that an even-handed attitude toward persons who are in the same situation is paramount in the matter of the Filipino war veterans. This is especially so where there would be nothing unfair in estopping the government.

IV

Denial of the Petition for Certiorari would not inhibit the Solicitor General from continuing to follow his practice of selectively prosecuting appeals from adverse

decisions. The government's complaint that denial of the petition "would compel the United States to reconsider this salutary practice" is highly exaggerated. See Petition at 21.

The decision to take an appeal from an adverse decision is, as a matter of practice, based largely upon the future effect of the adverse decision. In this light, the decision to appeal or not does now and always has taken into consideration possible results that are frequently indistinguishable from collateral estoppel -- for example, the result that the adverse decision will operate as precedent in a case that is indistinguishable on its facts.

Moreover, Dr. Mendoza's case rests upon unique facts and circumstances that are unlikely to arise again. Among these facts

and circumstances have been the government's own inexplicable wavering attitude toward the Filipino war veterans and its inability to show any great public interest in a relitigation of the merits.

V

Contrary to the government's assertion, the court below was not "plainly required" to permit a relitigation of the underlying issue by reason of Olegario v. United States, supra, an inconsistent decision in the government's favor. See Petition at 24.

Citing Parklane Hosiery, supra, the government says that "issue preclusion would be inappropriate when the 'judgment relied upon as a basis for estoppel is itself inconsistent with one or more previous judgments in favor of the defendant.'" Petition at 24,(emphasis added).

What this court actually said in Parklane Hosiery, however, was:

> Allowing offensive collateral estoppel may also be unfair to a defendant if the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant.

439 U.S. at 330. (emphasis added).

There is a big and obvious difference between the two phrases. To say that issue preclusion " would be inappropriate" in the presence of an inconsistent judgment means the courts are prohibited from applying the principle of collateral estoppel in such circumstances. However, it is equally apparent that when this court said it "may also be unfair" to estop a party in the presence of an inconsistent judgment it meant that an inconsistent judgment was only one factor among others for courts to consider in deciding whether

the application of collateral estoppel would be unfair. In short, applicability of collateral estoppel turns upon the matter of unfairness, not the presence or absence of an inconsistent judgment.

Moreover, the true import of Parklane Hosiery on this point was its reference to the foreseeability of future litigation as one of the most important factors in assessing unfairness. Id. This is because it might be unfair to estop a party who had no reason to foresee the likelihood of future litigation. On the other hand, there is nothing unfair about estopping a party, like the government in this instance, who plainly recognized not merely the likelihood but the certainty of future litigation.

CONCLUSION

The government's opposition to the

naturalization of Dr. Mendoza and other Filipino veterans of World War II is difficult to understand. Its concern that the naturalization of a relatively few war veterans who put their lives on the line in the Allied cause during World War II is all the more surprising in light of the administration's support of legislation which would grant permanent resident status to millions of aliens who have been living in the United States unlawfully. The petition for a writ of certiorari should be denied.

Respectfully submitted,

Donald L. Ungar
Attorney for Respondent
Sergio Elejar Mendoza

December 22, 1982.

Office - Supreme Court, U.S.
FILED
JAN 16 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-849

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

SERGIO ELEJAR MENDOZA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

REX E. LEE
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Department of Justice
Washington, D.C. 20530
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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Respondent has raised several points in opposition to our petition that warrant response. Primarily, however, this is a supplemental brief, filed pursuant to Rule 22.6 of the Rules of this Court, intended to direct the Court's attention to the recent decision of the United States Court of Appeals for the Ninth Circuit in *Barretto* v. *United States*, Nos. 80-4441, 80-4543 & 80-5427 (Dec. 10, 1982). As explained in the first section of this brief, that decision, a copy of which is reproduced as an appendix hereto, significantly extends the objectionable holding of the court of appeals in the instant case, and underscores the need for further review. Our reply to the brief in opposition follows discussion of *Barretto*.

A

1. a. In *Barretto* the court of appeals considered the naturalization applications of 16 Filipino war veterans.[1] These applications, like respondent Mendoza's, were predicated on Sections 701-705 of the Nationality Act of 1940, 8 U.S.C. (1940 ed. Supp. V 1945) 1001-1005. Like respondent, the petitioners for naturalization in *Barretto* claimed that they were denied due process of law by the Attorney General's removal of Section 702 overseas naturalization authority from the American vice-consul stationed in Manila for a portion of 1945 and 1946. And like respondent, they contended that the United States is collaterally estopped by the unappealed judgment in *In re Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931 (N.D. Cal. 1975) ("*68 Filipinos*") from denying their naturalization petitions.

None of the naturalization petitioners claimed to have made any effort to secure naturalization under Section 702 in the Philippines. Thus, like respondent, none of the petitioners qualified as "Category I" veterans—that class of individuals whose naturalization applications the Attorney General has decided not to oppose (see Pet. 9, 12). Moreover, 15 of the petitioners filed their naturalization applications after the United States withdrew its appeal in *68 Filipinos*, and, like respondent, were accordingly unable to avail themselves of the "grandfather rule" applied by the Solicitor General in cases arising from petitions filed before that date (see Pet. 12 n.12).

The remaining petitioner, Barretto, did file his naturalization petition prior to withdrawal of the appeal in *68 Filipinos*. His naturalization petition was nevertheless opposed because he spent the period February

[1] One of the cases consolidated in *Barretto*, *Pangilinan* v. *INS*, Pet. No. 251849-WWS (N.D. Cal. Sept. 24, 1980), involved the claims of 14 Filipino veterans.

1945 through June 10, 1946, in the United States, undergoing flight training, and because he actually filed a preliminary application for naturalization under the 1940 Act while in the United States. That application had evidently been rejected because it lacked the necessary signature of his commanding officer. Twenty days after his return to the Philippines, Barretto was discharged from the United States' armed forces and became ineligible for overseas naturalization under Section 702 of the 1940 Nationality Act. He thus was stationed in the Philippines for only 20 days when naturalization there under Section 702 was impossible because of the absence of a naturalization official.

b. Each of the naturalization claims was denied by the district court. In *Pangilinan* v. *INS*, Pet. No. 251849-WWS (N.D. Cal. Sept. 24, 1980), and *Litonjua* v. *INS*, Pet. No. 23358-GT (S.D. Cal. Apr. 8, 1981), the district courts, following the Second Circuit's decision in *Olegario* v. *United States*, 629 F.2d 204 (1980), cert. denied, 450 U.S. 980 (1981), rejected the collateral estoppel argument and denied the petitions on the merits. In *Barretto* v. *United States*, Pet. No. 248806-WWS (N.D. Cal. Aug. 15, 1980), the district court concluded that the petitioner could not claim any injury from the course of the government's administration of Section 702 in the Philippines, because he had been in the United States for almost all of the time during which a naturalization officer was absent from the Philippines, and had not sought naturalization during the 20 days after his return from the United States while he was still eligible for naturalization under Section 702.

2. Each petitioner appealed from the denial of his naturalization petition. While these appeals were pending, the court of appeals rendered its decision in the instant case. Shortly thereafter, relying upon its *Mendoza* decision, the court of appeals reversed the district

courts' judgments, and granted each naturalization petition.

a. The court of appeals concluded that the petitioners in *Pangilinan* and *Litonjua* were situated identically to respondent Mendoza (App., *infra*, 4a-5a). Rejecting the government's arguments against application of collateral estoppel for the reasons stated in the instant case (*id.* at 5a-8a), the court "readily agree[d] that the constitutional issues raised in *68 Filipinos* are significant" but commented that "the government overstates the precedential value of *68 Filipinos*, which is, after all, a district court opinion rendered on extraordinary facts" (*id.* at 8a, 9a). The court doubted that analogous litigation would arise in the future and observed that if future litigation (not controlled by *Mendoza* and *68 Filipinos*) were to arise,

> since the Second Circuit has declined to collaterally estop the government, and has disagreed with *68 Filipinos* on the merits, *Olegario v. United States*, 629 F.2d 204, 214-215 (2d Cir. 1980), *cert. denied*, 450 U.S. 980 (1981), there is a conflict in the circuits and the courts addressing analogous legal issues or new facts will have the benefit of both opinions. [App., *infra*, 9a & n.8.]

Stressing the importance of the "principles of consistency and fairness that underlie the doctrine of *stare decisis*" (*id.* at 9a-10a), the court of appeals concluded that *Mendoza* was controlling.

b. Turning to Barretto's petition, the court of appeals held that his situation was indistinguishable from that of other Category II veterans who filed their petitions in time to avail themselves of the "grandfather rule," and that *Mendoza* in any event required that Barretto's petition be granted (App., *infra*, 10a-13a). The court explained (*id.* at 12a; emphasis added):

> In *Mendoza* we found that Dr. Mendoza's presence in the Philippines for as much as three months, after having been in the United States for several

months, was sufficient to implicate Dr. Mendoza's due process rights, 672 F.2d at 1326 n.8; we know of no principled basis—and the government offers none—for drawing a line between three months in Dr. Mendoza's case and three weeks in this case. *If the government's conduct violated the constitutional rights of Filipinos serving in the United States armed forces in the Philippines, it violated their rights whether they were in the Philippines for nine months or nine days.*

3. The opinion of the court of appeals in *Barretto* serves to highlight the destructive effect of its *Mendoza* decision upon the heretofore accepted practice of development of the public law through appeals and the resolution of conflicts between the courts of appeals by this Court. It also highlights the tension between the decision in this case and this Court's decision in *Parklane Hosiery* v. *Shore*, 439 U.S. 322 (1979). Even though the district courts in *Barretto* found that the petitioners were not entitled to naturalization, the court of appeals ordered that that benefit must be granted because the United States, five years earlier, did not appeal a district court decision raising the same legal issue.

a. Paradoxically, the court of appeals freely acknowledged (App., *infra*, 8a) that the underlying constitutional issue in this case is significant, but contented itself with the observation that *68 Filipinos* was, after all, only a district court opinion. But it is not the United States that "overstates the precedential value of *68 Filipinos*" (*id.* at 9a), it is the decision of the court of appeals that improperly *elevates* the decision of the district court in *68 Filipinos* into a decision of a court of appeals. As the court of appeals put it, *68 Filipinos* coupled with *Mendoza*, and *Olegario*, together create a "conflict in the circuits" (*id.* at 9a n.8). It is thus difficult to understand why the court of appeals was not itself required, in this case, to redetermine the underly-

ing question of constitutional law in light of the persuasive force of both *Olegario* and *68 Filipinos*, just as it suggested in *Barretto* that other courts should do in subsequent cases (see App. *infra*, 9a n.8; see page 4, *supra*).

Similarly, while stressing the value of *stare decisis* and the need for uniformity of result in Filipino veterans cases, the court of appeals ignored the lack of uniformity produced by its own refusal to reconsider in *Mendoza* the constitutional question decided by the district court in *68 Filipinos* in light of the intervening conflicting decision of the Second Circuit in *Olegario*. More generally, in *Mendoza* and *Barretto* the court of appeals lost sight of the fact that the best way to ensure uniformity of result in adjudicating the claims of similarly situated individuals, absent considerations of *stare decisis* or a controlling precedent of a higher court, is for every court to render the decision it determines to be correct on the merits. The availability of rights of appeal, and of review by this Court in a proper case, then provides the most effective means of ensuring that each claimant is accorded its rights, without creating an undue risk of insulating erroneous legal rulings from review or encouraging uncritical government appeals.

b. In *Barretto*, the court of appeals invoked collateral estoppel to foreclose determination of the merits of the underlying constitutional issue even though, at the time the district courts had ruled on the petitions of Litonjua and Pangilinan, the Second Circuit's decision in *Olegario* created a precedent in conflict with *68 Filipinos*.[2] Thus, even assuming that, contrary to our main submission, *Parklane Hosiery* v. *Shore*, *supra*, is con-

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[2] *Olegario* had not been decided when the district court ruled in the present case (see Pet. App. 16a n.13), although it was decided prior to the time the court of appeals rendered its decision.

trolling in the circumstances of these cases, invocation of collateral estoppel was plainly inappropriate. See 439 U.S. at 330 & n.14. Indeed, the court of appeals refused to hold that the district courts' rejection of collateral estoppel was erroneous (App., *infra*, 10a n.8). Instead, the *Barretto* court, quite properly concerned about uniformity of result between this case and *Barretto*, simply invoked *stare decisis*, remarking cryptically that "in light of *Mendoza*, the government is now estopped as a matter of law" (*ibid*).

The dilemma faced by the court of appeals in *Barretto* was of its own devising. Because the claim presented in this case arises under a scheme of public law applicable to a class of persons, it was foreseeable (if not inevitable) when the court decided this case that a case such as *Barretto* would arise. Rather than employing *stare decisis* to extend the troublesome holding of *Mendoza* to cover circumstances where the application of collateral estoppel was properly rejected by the district court, the court of appeals should have recognized that the very policies of "consistency and fairness" it invoked in *Barretto* required it to reach the merits in the present case, rather than relying upon the artifice of collateral estoppel.

c. The court of appeals' holding that naturalization petitioner Barretto is not situated differently from respondent Mendoza, or from Pangilinan, Litonjua or any of the Category II veterans in *68 Filipinos*, highlights the sweeping scope of the court's collateral estoppel ruling. As we explain in our petition (pages 25-26), because the *68 Filipinos* court did not consider the effect of a prolonged period of residence in the United States (where naturalization was available) during the time when naturalization was unavailable in the Philippines, even if it may be said that respondent's due process rights were "*implicate*[*d*]" in this case, as the court below thought (Pet. App. 11a n.8), it was improper to

give preclusive effect to the earlier decision as to whether respondent's due process rights were *violated*. In *Barretto*, the court of appeals extended its illogical line of reasoning to a case where the Filipino veteran was deprived of the opportunity for overseas naturalization for only 20 days, had ample opportunity for naturalization in the United States, and actually made such an application. The court of appeals' decisions thus indicate that all Filipino veterans are entitled to naturalization in the Ninth Circuit, notwithstanding the absence of prejudice in a particular case.[3] This holding squarely conflicts with this Court's teaching that a showing of prejudice is a necessary element of a due process claim. See *United States* v. *Valenzuela-Bernal*, No. 81-450 (July 2, 1982), slip op. 10.

B

1. Respondent's contention (Br. in Opp. 5-7) that our argument is inconsistent with *Montana* v. *United States*, 440 U.S. 147 (1979), is incorrect. Because of the difference between the facts of this case and those considered in *68 Filipinos* (see Pet. 25-26), this case, unlike *Montana*, plainly calls for the application of the "unmixed questions of law" exception to the doctrine of issue preclusion that was recognized there by the Court. 440 U.S. at 162-163. In addition, the holding of *Montana* is inapposite because, unlike that case, the parties to the successive actions are not the same here.

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[3] Respondent's assurances (Br. in Opp. 12-13, 16-17) that his case is unique or nearly so is unavailing, for the decision below, especially as extended in *Barretto*, offers every Filipino War veteran who lawfully enters the United States the right to naturalization. In any event, the troubling aspect of the court of appeals' decision is not so much its impact on requests for naturalization by Filipino veterans as its wholly unprecedented application of collateral estoppel to prevent the United States from litigating an important question of constitutional law. See page 10, *infra*.

Montana's holding is also distinguishable because the doctrine applied there was, in practical effect, res judicata. The Court employed the collateral estoppel label solely because the government had undertaken the first round of litigation through a proxy. *Id.* at 154-155.

More fundamentally, the policy and practical considerations we outline in the petition (Pet. 17-22) had little application in *Montana*, for the issue presented there could arise in only two forums—the state courts in Montana and the United States District Court for Montana.[4] The issue, too, was not one involving a body of law applicable to a class of similarly situated persons, but one affecting the proprietary interest of the United States. Accordingly, the United States did not argue in *Montana*, as it does here, that the application of the preclusion doctrines was inappropriate in light of the government's special attributes and responsibilities, and the Court's opinion does not reflect any view respecting our present contentions.

2. Contrary to respondent's suggestion (Br. in Opp. 13), the government did not in any relevant sense "concede[ ] the validity of the district court's judgment" by withdrawing the appeal in *68 Filipinos*. Of course, the government thereby bound itself to comply with that judgment (see *Federated Department Stores* v. *Moitie*, 452 U.S. 394 (1981))—an obligation the government has more than fulfilled (see Pet. 12 & n.12)—but, as explained in the petition (Pet. 11, 20-21), it did not acqui-

[4] This consideration is especially significant because in *Montana*, unlike this case, the government had engaged in conduct that may implicate the core concerns underlying the preclusion doctrines. It had litigated the issue to a conclusion in the Supreme Court of Montana, noted an appeal to this Court, then dismissed the appeal and pursued its parallel action in the federal court. The federal action, moreover, had been filed just after the action in state court was filed, and had been stayed upon the government's stipulation pending resolution of the state court litigation.

esce thereby in the correctness of the district court's legal ruling. Respondent Mendoza was not a party to *68 Filipinos*. If the government had prevailed in that case (as it has prevailed in litigation involving other Filipino veterans), respondent would have been free to relitigate the legal issues in his own case. By the same token, the judgment in *68 Filipinos* did not require that the government grant respondent's petition for naturalization.

Nor is there any anomaly in the Department of Justice's reconsideration of its position on naturalization of Filipino veterans. As we explain in the petition, the present position of the United States is quite simply that *68 Filipinos* was wrongly decided; the withdrawal of the earlier appeal did not reflect any contrary view. Respondent's suggestion (Br. in Opp. 14), echoing the court of appeals (Pet. App. 12a, 13a, 15a), that the government has not justified its change in posture assumes that the United States has an obligation to justify its litigating judgments to the courts. That assumption is inconsistent with fundamental principles of our adversary system of justice, see *Hickman* v. *Taylor*, 329 U.S. 495, 510-512 (1947); cf. 5 U.S.C. 552(b)(5); Fed. R. Civ. P. 26(b)(3), and raises serious questions of separation of powers. Moreover, in noting on previous occasions that the government had altered its position on a legal issue, the Court has never suggested that such changes must be justified to the satisfaction of the courts. See, *e.g.*, *NLRB* v. *Iron Workers*, 434 U.S. 335, 350-351 (1978); *Barrett* v. *United States*, 423 U.S. 212, 222 n.6 (1976); *Automobile Club* v. *Commissioner*, 353 U.S. 180, 183 (1957).

3. Respondent suggests (Br. in Opp. 11-12, 16), finally, that we have exaggerated the impact of the decision below upon the government's prevailing practice of selective pursuit of appellate review, suggesting that the considerations we have adduced against application

of collateral estoppel would be persuasive in other kinds of cases. But neither respondent nor the court of appeals has identified any objective criterion that could guide the government in its litigating decisions in the wake of the decision below. See Pet. 23 n.22. Instead, the court of appeals arrogated to itself a standardless discretion to determine with the benefit of hindsight whether a fresh determination of a particular legal issue is in the public interest (see Pet. App. 20a).

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

JANUARY 1983

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-4441

D.C. NO. 248806 WWS

Re Naturalization of
RENATO LEOPOLDO BARRETTO,
PETITIONER-APPELLANT

v.

UNITED STATES OF AMERICA,
RESPONDENT-APPELLEE.

No. 80-4543

D.C. No. 251849-WWS

Re Naturalization of
ANTOLIN PUNSALAN PANGILINAN, ET AL.
PETITIONER-APPELLANTS

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT-APPELLEE.

No. 81-5427

D.C. No. 23358-GT

Re Naturalization of
MARIO VALDERRAMA LITONJUA,
PETITIONER-APPELLANT,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT-APPELLEE

OPINION

Appeals from the United States District Courts
for the Northern and Southern Districts of California
Honorable William W. Schwarzer,
U.S. District Judge, Presiding
Honorable Gordon Thompson, Jr.,
U.S. District Judge, Presiding

Argued and Submitted August 13, 1982

Before: SCHROEDER, FLETCHER, and NORRIS, Circuit Judges.

NORRIS, Circuit Judge:

These are three more in a series of Filipino war veteran cases arising under §§ 701-705 of the Nationality Act of 1940, Pub. L. No. 76-853, Ch. 199, 54 Stat. 1137, *as amended* by Pub. L. No. 77-507 § 1001, 56 Stat. 182 ("1940 Act"). Appellants are all Filipino veterans who served honorably in the United States armed services during World War II. They claim that they are entitled to United States citizenship under the 1940 Act because they were denied due process of law when the United States Attorney General removed an authorized naturalization officer from the Philippines in October 1945. They also contend that the government is collaterally estopped by the judgment in *Matter of Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931 (N.D. Cal. 1975) ("*68 Filipinos*") from relitigating their due process claims. The district courts denied all petitions. We reverse and grant the petitions.

I

A.

The history of this litigation is discussed at length in *Mendoza v. United States*, 672 F.2d 1320 (9th Cir. 1982) and *68 Filipinos*. We repeat it briefly here.

In March 1942, Congress amended the Nationality Act of 1940, Pub.L. No. 76-853, 54 Stat. 1137, to provide for naturalization of non-citizens who served honorably in the United States armed forces. 56 Stat. 182 (repealed 66 Stat. 280, June 27, 1952). As amended, the 1940 Act exempted alien servicemen from certain of the usual naturalization requirements, *id.* at § 701, and provided for overseas naturalization of servicemen on active duty. *Id.* at § 702. As further amended, the Act required that all petitions for naturalization under §§ 701 and 702 be filed by December 31, 1946. Act of Dec. 28, 1945, Pub.L. No. 79-270, § 202(c)(1), 59 Stat. 658 (repealed 66 Stat. 280, June 27, 1952).

In early August 1945, the Immigration and Naturalization Service (INS) designated George Ennis, Vice Consul in Manila, to naturalize Filipino servicemen under the 1940 Act. But when the Philippine government expressed concern that naturalizations under the Act would drain the country of much-needed manpower, the Attorney General revoked Vice Consul Ennis' naturalization authority. As a result, between October 1945 and August 1946, no INS official was present in the Philippines to naturalize eligible servicemen.

B.

In 1975, the claims of 68 Filipino war veterans, whose petitions for naturalization pursuant to the 1940 Act had been denied by the INS, were joined in district court. *Matter of Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931 (N.D. Cal. 1975) (Renfrew, J.). Judge Renfrew divided the petitioners into two relevant categories: those who had taken some action to be naturalized in the Philippines prior to December 31, 1946, but had not been processed by the INS (Category I), and those who had taken no action to be naturalized

in the Philippines (Category II)[1]. Judge Renfrew granted the petitions of "Category I" veterans on the alternate grounds that the government had engaged in "affirmative misconduct," which estopped it from contesting the veterans' petitions, and that the petitions had been "constructively filed" within the statutory deadline. *Id.* at 937-40. Judge Renfrew granted the petitions of "Category II" veterans on the ground that withdrawal of the naturalization examiner from the Philippines violated the equal protection component of the Due Process Clause of the Fifth Amendment. *Id.* at 951. The government filed a notice of appeal, but then withdrew it, permitting the judgment to become final.

II

A.

Appellant Pangilinan is one of fourteen Filipino veterans whose petitions were consolidated on appeal. We treat all fourteen as "Category II" veterans on the basis of a stipulation that their petitions raise issues identical to those raised by the "Category II" veterans in *68 Filipinos*. All served honorably in the United States armed forces; all were in the Philippines on active service for some or all of the time that naturalization authority was withdrawn; and none took steps to become naturalized while in the Philippines.

We also conclude that appellant Litonjua should be treated as a "Category II" veteran[2]. He enlisted in the

[1] A third category included Filipinos who could not prove that they had been eligible for naturalization under §§ 701-705.

[2] Although it did not raise the argument in its brief, the government asserted at oral argument that Litonjua is not a "Category II" veteran because he sought naturalization in Seattle after his discharge from the military. The argument is meritless. Litonjua was in the Philippines for six of the nine months that naturalization authority was withdrawn and, like the "Category II" veterans in *68 Filipinos*, he made no effort during that peri-

United States Navy in 1941 and became a prisoner of war in 1942. After his release in early 1945, Litonjua rejoined his unit in the Philippines, where he remained in active service until he was honorably discharged on April 10, 1946.[3] Thus, he was in the Philippines and eligible to be naturalized during a six month period (October 1945 to April 1946) when there was no INS official available to process his petition.

Because the theory of Barretto's claim differs from that of Pangilinan and Litonjua, we treat the status of his naturalization petition in Part III.

B.

Although Litonjua and the Pangilinan petitioners are "Category II" veterans, the district judges below declined to estop the government from relitigating the issues decided in *68 Filipinos*. Instead, they reached the merits of appellants' constitutional claims, and, relying on *Olegario v. United States*, 629 F.2d 204 (2d Cir. 1980), *cert. denied*, 450 U.S. 980 (1981), denied the veterans' petitions. In so doing, they acted without the benefit of our decision in *Mendoza v. United States*, 672 F.2d 1320 (9th Cir. 1982), in which we affirmed a district court judgment collaterally estopping the government on precisely these facts. Accordingly, the

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od to be naturalized under § 702. *See Mendoza*, 672 F.2d at 1326 n.8.

[3] Shortly thereafter, Litonjua went to Seattle, Washington as a civilian employee of the United States Army Transport Service. While in Seattle, he took steps to become naturalized under the 1940 Act, but, for reasons that are not clear on the record, the petition process was not completed. Litonjua is not, however, a "Category I" veteran, because the "Category I" veterans in *68 Filipinos* sought naturalization under § 702 while still on active duty in the Philippines. Litonjua claims that he should nonetheless be deemed to have constructively filed his petition before the statutory deadline. Because we resolve his case on an alternate ground, we do not reach this issue.

threshold legal question in the Litonjua and Pangilinan appeals is the effect of our decision in *Mendoza* on the question whether the government should be precluded from relitigating issues decided in *68 Filipinos*[4].

The facts presented in *Mendoza* were similar to those at issue here. Dr. Mendoza, like Litonjua and the Pangilinan petitioners, qualified as a "Category II" veteran. He served in the United States armed forces from December 1, 1941 until June 30, 1946. During that time, he was captured by the Japanese and survived the Bataan Death March. Once released by the Japanese, he was sent to the United States for army medical training; six months later, he returned to the Philippines, where he remained for the duration of his service. At no point during that time—indeed, not until 1978—did he make any effort to become an American citizen. The district court, in granting Dr. Mendoza's petition for naturalization, applied the doctrine of collateral estoppel based upon the guidelines set out in *Parklane Hosiery v. Shore*, 439 U.S. 322 (1979), which encouraged use of collateral estoppel offensively when

[4] Because the relevant facts are not in dispute, this court is equipped to decide whether, in light of *Mendoza*, collateral estoppel should be invoked offensively against the government in the *Pangilinan* and *Litonjua* cases. See *Starker v. United States*, 602 F.2d 1341 (9th Cir. 1979). In *Starker*, as here, the district court declined to estop the government collaterally, but did so without the benefit of the Supreme Court's decision in *Parklane Hosiery v. Shore*, 439 U.S. 322 (1979). Rather than remand to the district court for reconsideration in light of *Parklane Hosiery*, our court made an independent determination to apply collateral estoppel against the government, reasoning that "we [could] discern no useful purpose in a remand for the exercise of the discretion called for in *Parklane Hosiery*. This court can apply to agreed facts the discretionary standards set out in that opinion." *Starker*, 602 F.2d at 1349. Similarly, no useful purpose would be served by a remand to determine on the basis of the agreed facts the legal effect of our decision in *Mendoza* on the Litonjua and Pangilinan petitions.

its application would not be unfair to the defendant.[5] We held that the district court did not abuse its discretion because the "dual purpose of protecting litigants from the burden of relitigating an identical issue ... and of promoting judicial economy by preventing needless litigation," *id.* at 326, would be served by barring the government from relitigating issues decided in *68 Filipinos*. *Mendoza*, 672 F.2d at 1325-26. We were unpersuaded by the government's argument that it would be unfair[6] to grant Dr. Mendoza's naturalization petition without reaching the merits of his equal protection claim.

To support its claim of unfairness, the government in *Mendoza* first asserted that it had prematurely withdrawn its appeal in *68 Filipinos* because it had grossly underestimated the number of Filipinos who would become eligible for naturalization under its holding. We found no record support, however, for the contention that, after withdrawing its appeal, the government discovered that as many as 60,000-80,000 Filipino veterans could be expected to petition for naturalization in reliance upon Judge Renfrew's decision in *68 Filipinos*. The government, for instance, did not indicate how many of those potential applicants had in fact petitioned after *68 Filipinos* was decided in 1975, or how many of those veterans actually eligible to petition were realis-

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[5] The Court in *Parklane Hosiery* identified several potential sources of unfairness: if potential plaintiffs sit on the sidelines until another plaintiff has obtained a favorable judgment; if the second action involves substantially higher stakes than the first, or affords the defendant procedural opportunities not originally available; or if circumstances have changed by the time of the second suit. 439 U.S. at 330-31.

[6] The government did not contend that Dr. Mendoza had adopted a "wait and see" attitude to reap the fruits of the earlier litigation; we thus did not reach the issue whether application of collateral estoppel would have been inappropriate on that score.

tically likely to do so nearly 40 years after the end of World War II. In fact, the record suggested that only a very few Filipinos had taken advantage of the opportunity; congressional testimony by INS officials indicated that no more than 100 Filipinos had applied for naturalization as of 1978. 672 F.2d at 1327. In the cases now before us, the government has made no effort to challenge that testimony or otherwise bolster its claim of unfairness; in fact, at oral argument the government formally abandoned its contention that the issues in *68 Filipinos* should be relitigated because it had grossly miscalculated the impact of that decision on the number of naturalization petitions from Filipino war veterans it could expect to receive.

In *Mendoza*, we also rejected the government's argument that collateral estoppel should be invoked offensively only against private litigants. *Id.* at 1329. Acknowledging that relitigation by the government might be warranted in cases raising significant issues of public policy or consitutional law, we nonetheless found no compelling need for relitigation in that case.

The merits of these arguments were thus fully considered in *Mendoza*, and need not be reconsidered here. We now address the government's sole remaining argument[7] that giving collateral estoppel effect to *68 Filipinos* would insulate significant constitutional issues from appellate review. *See Montana v. United States*, 440 U.S. 147, 163 (1979) (cautioning that collateral estoppel should not be applied lightly where to do so might freeze constitutional doctrine on significant national issues); *Mendoza*, 672 F.2d at 1329-30. Although we readily agree that the constitutional issues raised in *68 Filipinos* are significant, we believe that

[7] As in *Mendoza*, the government does not suggest that Litonjua and the Pangilinan petitioners could have joined the *68 Filipinos* litigation and thus that they are unfairly profiting from its results.

the government overstates the precedential value of *68 Filipinos*, which is, after all, a district court opinion rendered on extraordinary facts. The events giving rise to the *68 Filipino* claims occurred over 35 years ago in the unusual context of a war-related immigration statute and the impending independence of the Philippines; it is highly improbable that the government will again be involved in litigation involving analogous facts. And if legal issues analogous to those resolved in *68 Filipinos* arise on different facts, the government would be free to relitigate them, *see Commissioner v. Sunnen*, 333 U.S. 591, 601-02 (1948); *Montana v. United States*, 440 U.S. at 162-63, burdened only by a district court opinion as related precendent.[8] Thus, application of collateral estoppel would not freeze constitutional doctrine on important national issues or otherwise inhibit healthy development of the law.

Absent a change in circumstances, which the government has neither claimed nor demonstrated, therefore, *Mendoza* must control the disposition of the *Pangilinan* and *Litonjua* appeals. We conclude that our determination in *Mendoza* that it is not unfair to estop the government from contesting the naturalization petitions of "Category II" veterans is binding in these cases as *stare decisis*. To permit district courts in the Ninth Circuit to redetermine the issue of fairness after our decision in *Mendoza*—and thus treat identically situated "Category II" veterans differently from Dr. Mendoza—would be abhorrent to the principles of consistency and fairness that underlie the doctrine of *stare decisis*, *see Thomas v. Washington Gas Light Co.*, 448

[8] Moreover, since the Second Circuit has declined to collaterally estop the government, and has disagreed with *68 Filipinos* on the merits, *Olegario v. United States*, 629 F.2d 204, 214-15, 130 (2d Cir. 1980), *cert. denied*, 450 U.S. 980 (1981), there is a conflict in the circuits, and courts addressing analogous legal issues on new facts will have the benefit of both opinions.

U.S. 261, 272 (1980), and would undermine "public faith in the judiciary as a source of impersonal and reasoned judgments." *Moragne* v. *States Marine Lines, Inc.* 398 U.S. 375, 403 (1970).

For the foregoing reasons, therefore, we hold that the government is collaterally estopped from relitigating against these "Category II" veterans the issues decided in *68 Filipinos*[9]. This result is consistent with the guidelines set out in *Parklane Hosiery*. Once it has been conclusively determined that collateral estoppel is not unfair to a defendant, and does not reward a plaintiff who could easily have joined the initial suit, we believe that, absent a change of circumstances, *Parklane Hosiery* requires its application as a matter of law. By deciding as we do, we thus adhere both to the standards set in that case and to the reasoning of our *Mendoza* decision.

III

We now turn to Appellant Barretto's petition. Barretto joined the United States armed forces in August 1941. He saw active duty in Central Luzon, Bataan and Corregidor and was imprisoned by the Japanese from May 1942 to November 1943. In February 1945, Barretto was assigned to flight training duty in the United States. While there, he tried to file a preliminary application for naturalization under the 1940 Act, but the INS would not accept his application because it lacked the signature of his commanding officer.[10]

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[9] We do not hold that the trial judges, who ruled without the benefit of *Mendoza*, abused their discretion in denying collateral estoppel. Rather, we hold that, in light of *Mendoza*, the government is now estopped as a matter of law.

[10] Barretto was unable to obtain the signature because his commanding officer was in the Philippines. Barretto argues that the signature was required only on the filing of a formal petition and that the refusal to accept his preliminary application was

Barretto returned to the Philippines on June 10, 1946 and was discharged from the United States armed forces on June 30, 1946.

Barretto filed this petition for naturalization in June 1977, and the government withdrew its *68 Filipinos* appeal in November 1977. Because several Filipino veterans apparently agreed with the INS to hold their claims in abeyance pending the outcome of the appeal in *68 Filipinos*, the government has adopted a "grandfather" policy of granting any petitions filed by "Category II" veterans before withdrawal of the *68 Filipinos* appeal.[11] Brief of Respondent-Appellee at 13 n.21; Supplemental Brief of Respondent-Appellee at 2-6. *See, e.g., United States v. Domingo v. Avena*, No. ____ (N.D. Cal. Jan. 17, 1979), *appeal withdrawn*, No. 79-4361 (9th Cir. ____ 1979). At oral argument, the government stipulated that it would withdraw its opposition to Barretto's petition if this court finds that Barretto is a "Category II" veteran within the meaning of *68 Filipinos*.

The district court held that Barretto is not a "Category II" veteran because he was not prejudiced by the government's withdrawal of naturalization authority from the Philippines. The district court reasoned that Barretto was in the United States during much of the period that a naturalization officer was absent from the Philippines; that Barretto was stationed in the Philippines and eligible for naturalization under § 702 for only twenty days of that period; and that Barretto

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"affirmative misconduct," and that the government is thus estopped from contesting his petition. Because we decide his case on an alternate ground, we do not reach this issue.

[11] The government has also adopted a policy of granting all petitions of "Category I" veterans, whether filed before or after withdrawal of the appeal in *68 Filipinos*. Brief of Respondent-Appellee at 13 n.21.

testified that he made no attempt to inquire about naturalization after he returned to the Philippines.

We cannot agree that Barretto is disqualified from relief because he was in the Philippines and eligible for naturalization under § 702 for only twenty days. In *Mendoza*, we found that Dr. Mendoza's presence in the Philippines for as much as three months, after having been in the United States for several months, was sufficient to implicate Dr. Mendoza's due process rights, 672 F.2d at 1326 n.8; we know of no principled basis—and the government offers none—for drawing a line between three months in Dr. Mendoza's case and three weeks in this case. If the government's conduct violated the constitutional rights of Filipinos serving in the United States armed forces in the Philippines, it violated their rights whether they were in the Philippines for nine months or nine days.

Nor do we agree that Barretto's failure to inquire about naturalization upon his return to the Philippines disqualifies him from relief as a "Category II" veteran. None of the "Category II" veterans in *68 Filipinos* had taken steps to be naturalized, and we see no reason to distinguish Barretto's inaction from theirs simply because Barretto knew of his right to naturalization under the 1940 Act.[12] Barretto has shown that he would have been eligible for naturalization in the Philippines if an INS officer had been present, and that he wished to avail himself of his right to naturalization. He has thus demonstrated "a 'distinct and palpable injury' . . . [and] a 'fairly traceable' causal connection between the

[12] The opinion in *68 Filipinos* does not indicate whether the "Category II" veterans did or did not know of their rights under §§701-705. In any event, the record does not show that Barretto knew there was a possibility of being naturalized while outside the United States. Thus, even if relevant, we could draw no negative inference from his failure to seek naturalization in the Philippines.

claimed injury and the challenged conduct," *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72 (1978) (citations omitted), and he has standing as a "Category II" veteran to challenge the government's actions. Thus, pursuant to the government's "grandfather" policy and its stipulation in court, we hold that Barretto is legally entitled to be naturalized.

The judgments of the district courts are REVERSED and the naturalization petitions of all appellants in these consolidated appeals are GRANTED.

Office-Supreme Court, U.S.
FILED
MAY 12 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-849

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

SERGIO ELEJAR MENDOZA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the United States may be collaterally estopped from litigating a question of constitutional law of public importance by the judgment of a district court in a prior case, involving different parties, in which the question was resolved adversely to the United States.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 672 F.2d 1320. The opinion of the district court (Pet. App. 22a-24a) is not officially reported. The findings of fact, conclusions of law and recommendations of the designated naturalization examiner (Pet. App. 25a-33a) are likewise unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 34a) was entered on April 2, 1982, and a timely petition for rehearing was denied on July 22, 1982 (Pet. App. 35a). On October 13, 1982, Justice Rehnquist extended the time in which to file a petition for a writ of certiorari to and including November 19, 1982. The petition was filed on

the latter date and was granted on January 24, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATION INVOLVED

Sections 701, 702 and 705 of the Nationality Act of 1940, 8 U.S.C. (Supp. V 1945) 1001, 1002 and 1005; Section 310(e) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1421(e); and 28 C.F.R. 0.20(b) are reproduced in an appendix to this brief, *infra*, 1a-3a.

STATEMENT

Respondent, a Filipino national, entered the United States in 1975 in a nonimmigrant status. On May 10, 1978, after other legal avenues intended to prolong his stay in the United States had been exhausted or abandoned, respondent filed a petition for naturalization under Section 701 of the Nationality Act of 1940. Section 701, a provision then no longer in force, had relaxed the normal naturalization requirements for certain individuals who fought in the United States armed forces in World War II. Respondent claimed that he was entitled to naturalization based upon his service during World War II in the Army of the Commonwealth of the Philippines. The designated naturalization examiner recommended that the petition be denied, noting that respondent was not eligible for naturalization under the provisions of the Immigration and Nationality Act of 1952 then in effect and that naturalization under Section 701 of the 1940 Act was unavailable because petitioner had not filed for naturalization by December 31, 1946, the date on which that provision expired. The examiner also rejected respondent's argument that naturalization was necessary to remedy an alleged denial of due process in the administration of Section 701 in the Philippines at the close of World War II.

The district court rejected the naturalization examiner's recommendation and granted the petition without reaching "the Constitutional issues or other merits of the petition" (Pet. App. 22a). The district court concluded that the United States was collaterally estopped to oppose respondent's naturalization petition because the constitutional question presented by that petition had been resolved adversely to the United States in a case involving the naturalization petitions of different individuals, *In re Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931 (N.D. Cal. 1975). The court of appeals affirmed, like the district court relying solely upon the doctrine of collateral estoppel.

A. The Background of this Case

1. Respondent served as a physician with the Philippine Commonwealth Army from December 1, 1941, until June 30, 1946. During that time, as the United States became involved in World War II, the Commonwealth Army, which was ordinarily under the control of the semi-autonomous Commonwealth government in peacetime, was incorporated into the armed forces of the United States pursuant to the order of President Roosevelt.[1] Respondent was held prisoner by Japanese forces from April 1942 until February or March 1945. Upon his release respondent remained in the Commonwealth Army. In the fall of 1945 the United States Army sent respondent to Pennsylvania for approximately six months of medical training. Shortly after his return to the Philippines, on June 30, 1946, respondent secured his discharge from the Commonwealth Army. Pet. App. 7a.

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[1] Pursuant to Section 10(a) of the Philippine Independence Act of 1934, ch. 84, 48 Stat. 463, the Philippines were scheduled to become a fully independent, self-governing nation on July 4, 1946. Although the Philippines was a United States possession prior to the latter date, it enjoyed considerable autonomy under the terms of the Independence Act.

2. The statute upon which respondent's petition for naturalization rests is Section 701 *et seq.* of the Nationality Act of 1940, 8 U.S.C. (Supp. V 1945) 1001 *et seq.*, as added by the Second War Powers Act, 1942, ch. 199, Section 1001, 56 Stat. 182-183. Section 701 exempted from some of the usual requirements for naturalization (including literacy in English and a period of residence in the United States) certain alien servicemen who had served honorably in the United States armed forces during World War II in locations beyond the continental limits of the United States. As amended by Section 202(c)(1) of the Act of Dec. 28, 1945, ch. 590, 59 Stat. 658, the Act specified that any petition thereunder was to be filed no later than December 31, 1946.

Section 702 of the 1940 Act provided for the *overseas* naturalization of persons actually serving in the United States armed forces who were eligible for naturalization under Section 701 but who were beyond the jurisdiction of the United States courts vested with naturalization authority. Representatives designated by the Commissioner of Immigration and Naturalization were authorized to receive petitions, conduct hearings, and grant naturalization outside the United States. Pursuant to Section 705 of the 1940 Act, the Commissioner and the Attorney General implemented the provisions of Sections 701 and 702. Between 1943 and 1946 immigration officers traveled on rotation through Great Britain, Ireland, North America and the Pacific Islands, admitting thousands of foreign nationals serving in the United States armed forces to citizenship.

Naturalization of alien servicemen in the Philippines was, of course, impossible during the Japanese occupation.[2] The liberation of the Philippines by Allied forces began in February 1945. After resolution of some thresh-

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[2] Between 1942 and 1945, however, approximately 7,000 Filipino servicemembers were naturalized under Section 701 at locations outside the occupied Philippines.

old questions respecting the application of Section 701 to Filipino servicemen,[3] the Immigration and Naturalization Service, in early August 1945, designated George Ennis, an American vice-consul in Manila, to naturalize aliens pursuant to Section 702. Almost immediately, the Philippine government expressed its concern to the State Department about the possibility that large numbers of young Filipino men, perhaps as many as 250,000, would be naturalized and leave for America on the eve of the scheduled Philippine independence (see page 3 note 1, *supra*). On September 13, 1945, the Commissioner of Immigration and Naturalization recommended to Attorney General Clark that the situation be handled by revoking the authority previously granted to Ennis. The Attorney General approved the Commissioner's recommendation on September 26, 1945, and Ennis' authority to naturalize alien servicemen was thereafter revoked. Naturalizations ceased by October 27, 1945.

The INS subsequently reconsidered and abandoned its prior position (see note 3, *supra*) that members of the Commonwealth Army were eligible for citizenship under

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[3] One question was whether service in the Army of the Commonwealth of the Philippines qualified as service in the military forces of the United States for purposes of Section 701. Doubt existed because the Army of the Commonwealth, an instrumentality of the Philippine government, was simply incorporated as a unit into the United States armed forces by Presidential order. By contrast, a separate unit known as the Philippine Scouts was an integral unit of the United States Army; its members thus had individually enlisted in the armed forces of the United States, and their status for this purpose was comparatively free from doubt. In 1945 the INS concluded that members of both Philippine units were covered by Section 701 (but see page 6 & note 4, *infra*).

A second question concerned the eligibility for naturalization under Section 701 of Filipinos who had never resided in the United States. The Attorney General concluded that prior residence in the Philippines, then an American possession, satisfied the statute's requirements on that score.

Section 701.[4] The revised administrative interpretation substantially diminished the foreign relations difficulties posed by the presence in the Philippines of a United States official authorized to naturalize alien servicemen. Accordingly, in August 1946, the Service once again designated a naturalization representative for the Philippines. The representative remained on duty until December 1946 and naturalized many Philippine Scouts (see page 5, note 3, *supra*) who were still on active duty at that time and were still regarded as eligible under Section 702.[5]

3. Although respondent was present in the Philippines between August and October 1945, when naturalization under Section 702 was possible there, it is undisputed that he made no effort to take advantage of that opportunity. Nor did he make any effort to avail himself of the substantive provisions of Section 701, which were available to him without any need for recourse to the special overseas naturalization provisions of Section 702, during the time he was stationed in Pennsylvania.[6]

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[4] The agency's action was triggered by enactment of the First Supplemental Surplus Appropriation Rescission Act, 1946, ch. 30, 60 Stat. 6, 14, which provided in part that service in the Army of the Commonwealth of the Philippines was not to be deemed service in the United States Armed Forces for purposes of any United States statute conferring benefits on military veterans. But see page 10 note 9, *infra*.

[5] Neither the First Supplemental Surplus Appropriation Rescission Act nor the altered administrative interpretation of Section 701 prompted by that Act (see note 4, *supra*) had any application to members of the Philippine Scouts.

[6] The INS did not adopt its revised interpretation of Section 701, excluding members of the Commonwealth Army from the benefits of that provision, until after the date of respondent's return to the Philippines and his discharge from service.

By the time naturalization was again available in the Philippines under Section 702, respondent was doubly ineligible. First, he was no longer in service. Second, the INS regarded service in the Com-

Respondent returned to the United States in 1975 in a nonimmigrant status. His right to remain was extended by the INS through June 9, 1976. During this time respondent operated a restaurant and attempted to start an export-import business. On July 15, 1976, respondent sought to change his status to that of a Treaty Investor. This application was denied by the INS District Director on August 29, 1977, because respondent had not complied with the conditions of his nonimmigrant status. Respondent took an administrative appeal from that decision, but subsequently abandoned that appeal and filed the petition for naturalization under Section 701 that gave rise to this case.

B. Prior Filipino Veteran Litigation

Because Section 701 required filing of a naturalization petition prior to the close of 1946, its provisions did not give rise to litigation in the ensuing years. In the late 1960's, however, there commenced a significant flow of litigation under Section 701 involving novel arguments resting upon the manner in which Section 702 had been administered in the Philippines during 1945 and 1946. In every case, the immigration petitioner, a Filipino veteran, asserted that naturalization should be granted notwithstanding the expiration of Section 701.[7]

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monwealth Army as nonqualifying under Section 701. In any event, respondent made no application for naturalization at this time either.

[7] Section 329 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1440, currently authorizes naturalization of aliens who fought in this nation's armed forces during World War II. Unlike its predecessor, Section 701 of the 1940 Act, however, the benefits of Section 329 are available only to those who either (1) enlisted or were inducted in certain geographical areas (which do not include the Philippines) or (2) are lawfully admitted to the United States for permanent residence. It is accordingly significantly more restrictive than Section 701. Respondent does not claim eligibility for naturalization under the current provision.

1. In *INS* v. *Hibi*, 414 U.S. 5 (1973), this Court considered the ramifications of the course of administration of Section 702 in the Philippines upon facts strikingly similar to those of the present case. Hibi, a veteran of the Philippine Scouts, entered the United States in 1964 and petitioned for naturalization under Section 701 in 1967. He argued that despite 8 U.S.C. 1421(e), which expressly precludes naturalization under provisions of law no longer in effect, the United States was estopped from enforcing the statutory time limit for filing a petition under Section 701. Hibi claimed that an estoppel arose from the alleged failure of government officials to inform him of his opportunity for naturalization, and from the revocation of Vice-Consul Ennis' naturalization authority in October 1945 and the failure to provide a substitute until August 1946. The district court granted Hibi's petition, adopting his estoppel argument, and the court of appeals affirmed. 475 F.2d 7 (9th Cir. 1973).

This Court summarily reversed, explaining that no estoppel could lie against the government in these circumstances (414 U.S. at 8-9):

> It is well settled that the Government is not in a position identical to that of a private litigant with respect to its enforcement of laws enacted by Congress. * * * Here [the INS] has been charged by Congress with administering an Act which both made available benefits of naturalization to persons in [Hibi's] class and established a cutoff date for the claiming of such benefits. [The INS], in enforcing the cutoff date established by Congress, * * * is enforcing public policy established by Congress.
>
> While the issue of whether "affirmative misconduct" on the part of the Government might estop it from denying citizenship was left open in *Montana* v. *Kennedy*, 366 U.S. 308, 314, 315 (1961), no conduct of the sort there adverted to was involved here. We do not think that the failure to fully publicize the rights which Congress accorded under the Act of 1940, or the failure to have stationed in the Philippine Islands

> during all of the time those rights were available an authorized naturalization representative, can give rise to an estoppel against the Government.
>
> [Hibi's] effort to claim naturalization under a statute which by its terms had expired more than 20 years before he had filed his lawsuit must therefore fail.

2a. In *In re Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931 (N.D. Cal. 1975) (hereinafter "*68 Filipinos*"), the district court (Renfrew, J.) considered petitions for naturalization resting upon Sections 701-705 of the Nationality Act of 1940 filed by 68 Filipino veterans who had served in the Commonwealth Army or the Philippine Scouts during World War II.[8] Rejecting the recommendations of the naturalization examiners, the district court granted the petitions with certain exceptions.

The district court first considered the claims of those who it found to have filed timely preliminary applications for naturalization that had not been acted upon. 406 F. Supp. at 937-940. As to these "Category I" veterans, the court held in the alternative that: (1) the failure to process the submitted applications was "affirmative misconduct," which, notwithstanding *INS* v. *Hibi*, *supra*, "estopped [the United States] from relying upon the expiration date of Sections 701-705 as grounds for denial of their petitions for naturalization" (406 F. Supp. at 939; footnote omitted), and (2) because they had done all that was practical to avail themselves of the opportunity provided by Section 701 at the proper time, they should be deemed to have "constructively filed" formal petitions for naturalization within the statutory time limit (*id.* at 940).

The district court defined a second category to include 53 veterans who, like respondent Mendoza, made no effort to secure naturalization under Section 702 in a timely manner. These "Category II" veterans claimed that the

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[8] *68 Filipinos* was not a class action.

absence from the Philippines during the period October 1945 through August 1946 of an official empowered to effect naturalizations denied them equal protection in violation of the Due Process Clause of the Fifth Amendment, and that because of that violation they were entitled to have their tardy naturalization petitions granted. In response the government argued that: (1) Filipinos were overseas aliens unprotected by the Due Process Clause at the time in question because of the enactment, in 1934, of the Philippine Independence Act; (2) the veterans' claims were foreclosed by *INS* v. *Hibi*, *supra*; (3) because Attorney General Clark's decision to withdraw naturalization authority from Vice-Consul Ennis responded to the complaint of a foreign government and was based upon considerations of foreign policy, the veterans' claims presented a nonjusticiable political question; and (4) the Attorney General's action did not deny the veterans' due process.[9]

The district court rejected each of these contentions (406 F. Supp. at 940-951). The court acknowledged that "the actions of the Commissioner of the INS were motivated by reasonable concern for the maintenance of amicable relations between the United States and the Philippine Islands" (*id.* at 951). Nevertheless, the court, applying a strict scrutiny standard,[10] held that "the failure of the Government to have stationed in the Philippine Islands a representative of the INS authorized to naturalize mem-

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[9] ..fter the decision in *In re Munoz*, 156 F. Supp. 184 (N.D. Cal. 1957), the INS abandoned the argument that provisions of the First Supplemental Surplus Appropriation Rescission Act, 1946, rendered the benefits of Section 701 unavailable to veterans of the Commonwealth Army, and did not otherwise argue thereafter that service in the Commonwealth Army was nonqualifying for purposes of Section 701. Compare pages 5-6 & notes 3-4, *supra*.

[10] In the district court's view, absence of a naturalization officer from the Philippines constituted discrimination upon the basis of race, alienage or nationality, and was accordingly subject to strict scrutiny (406 F. Supp. at 950).

bers of the American armed forces pursuant to Section 702 of the 1940 Act during all of the time those statutory rights were available denied petitioners due process of law" (406 F. Supp. at 951). Thus, the district court granted the naturalization petition of each of the Category II veterans. Only those ("Category III") veterans who were unable to show that they had ever been eligible for naturalization under Section 701 were denied naturalization (*id.* at 937, 951).[11]

b. Pursuant to authority delegated by the Attorney General to determine whether an appeal should be taken from a judgment adverse to the interests of the United States, see 28 C.F.R. 0.20(b), in March 1976 the Solicitor General authorized an appeal from the district court's decision. An appeal to the Ninth Circuit was docketed and the case was briefed and readied for oral argument.

In the interim, however, a new Administration had taken office. By memorandum dated September 21, 1977 (Pet. App. 36a-42a), newly appointed INS Commissioner Castillo sought authorization to withdraw the pending appeal (see *id.* at 30a). Noting that "[t]he desire expressed by the Philippine Government in 1945 to hold onto its young manpower in the post-war period" was no longer an operative consideration (*id.* at 41a), the INS Commissioner stressed that acquiescence in the naturalization of the *68 Filipinos* petitioners "would be in keeping with the policy of the [new] Administration," described as "a course of compassion and amnesty" (*id.* at 42a). Commissioner Castillo's request provoked considerable discussion, and some dissent, within the Department of Justice. The

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[11] Shortly after rendering its opinion, the district court issued an addendum thereto, responding to the decision in *Santiago* v. *INS*, 526 F.2d 488 (9th Cir. 1975) (en banc), which apparently had given it cause to reconsider its application of equitable estoppel to the claims of Category I veterans. In the addendum (406 F. Supp. at 951), the district court reaffirmed its alternative holding that the Category I veterans had constructively met the stautory time limit, and observed that the court's due process ruling respecting Category II veterans was applicable, as well, to the Category I veterans.

memoranda prepared for the Solicitor General's consideration reflect the conviction that the district court's legal conclusions were legally erroneous, but that acquiescence in naturalization of the petitioners would be an acceptable accommodation in light of the inequities perceived by the officials vested by law with policy making authority, and would not affect significant numbers of individuals or establish a binding precedent. In response to these recommendations, on November 14, 1977, the Solicitor General authorized withdrawal of the pending appeal. On November 30, 1977, the court of appeals granted the government's motion to dismiss the appeal.

c. In the aftermath of these events, Commissioner Castillo was questioned during congressional oversight hearings about his recommendation that the appeal in *68 Filipinos* be dismissed.[12] The government's position respecting Filipino veterans' naturalization petitions under Section 701 was also reconsidered within the Department of Justice. The position ultimately adopted in 1978, after thorough reexamination, was that the Department would not ordinarily oppose naturalization of Filipino veterans who had actually attempted to become naturalized United States citizens pursuant to Sections 701 and 702 while those provisions were in effect—*i.e.*, "Category I" veterans. Contrary to the position adopted in withdrawing the appeal in *68 Filipinos*, however, the Department instructed the INS thereafter to oppose naturalization of all those who could not satisfy this prerequisite, including "Category II" veterans. See Pet. App. 30a; *Olegario* v. *United States*, 629 F.2d 204, 214 (2d Cir. 1980), cert. denied, 450 U.S. 980 (1981).[13]

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[12] Commissioner Castillo explained that his recommendation had been based on equitable considerations "aside from the legal argument of, was correct procedure of process used." *Oversight of INS Programs and Activities, Hearings Before the Subcomm. on Immigration, Citizenship and International Law of the House Comm. on the Judiciary*, 95th Cong., 2d Sess. 272 (1978).

[13] To mitigate any hardship that might otherwise result from this change in policy, the Solicitor General adopted a "grandfather rule"

3. The issues presented by the filing of tardy naturalization petitions by Filipino veterans resting on Section 701 were next considered by the Second Circuit in *Olegario* v. *United States*, *supra*. Adopting Judge Renfrew's reasoning in *68 Filipinos*, the district court had granted Olegario's petition for naturalization, 473 F. Supp. 185 (S.D. N.Y. 1979), and the government appealed.[14] On appeal, the Second Circuit considered the argument that under *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979), the unappealed final judgment in *68 Filipinos* should be given collateral estoppel effect, so as to preclude denial of naturalization to any "Category II" Filipino veteran. The Second Circuit rejected this contention, observing that "[i]n contrast to *Parklane*, the government is the defendant here, and the case raises issues of national concern." 629 F.2d at 215. The court noted that the government's failure to appeal an adverse decision may rest upon policy

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exception to this general rule, declining to authorize appeal from orders granting naturalization to Category II Filipino veterans who had filed naturalization petitions prior to the withdrawal of the government's appeal in *68 Filipinos*. See *Olegario* v. *United States*, *supra*, 629 F.2d at 214-215. The grandfather exception was adopted because there was reason to believe that processing of at least some such petitions had been delayed by INS, either unilaterally or by agreement with opposing counsel, in anticipation of securing a definitive ruling upon appeal in *68 Filipinos*. It was further recognized that absent that procedure some of the petitions involved would have been granted at the time the government withdrew its *68 Filipinos* appeal. Because it was thought difficult to determine with confidence which naturalization petitioners had relied to their detriment upon such procedural understandings, the Solicitor General authorized withdrawal of previously authorized appeals in all cases falling within the "grandfather rule" and declined to authorize appeal in other such cases. Among the appeals withdrawn were those in *In re Nisperos*, 471 F. Supp. 296 (C.D. Cal. 1979), and *In re Colmenar*, No. 308-P-22551 (S.D. Cal. Mar. 20, 1979). See Pet. App. 8a.

[14] Olegario was a "Category II" veteran—*i.e.*, he had not made a timely effort to avail himself of the benefits of Section 701. Nor was his petition filed in time to benefit from the "grandfather rule" adopted by the Solicitor General (see page 12 note 13, *supra*).

considerations, rather than acquiescence in the decision's legal reasoning, and that the invocation of collateral estoppel would compel the Solicitor General to authorize appeal from adverse decisions in an uncritical manner (*ibid.*). The court also stressed that the United States has broad discretion whether to pursue an appeal in a particular case and remains free to change positions previously adopted whenever a prior position is determined to have been ill-advised (*id.* at 216). Turning to the merits, the Second Circuit concluded that the absence of a naturalization officer from the Philippines during part of the period when naturalization under Section 701 was authorized did not violate the statute itself or work a denial of due process or equal protection. 629 F.2d at 223-233. Accordingly, the Second Circuit reversed the district court's decision and directed that Olegario's petition be denied.

C. Proceedings Below

1. Respondent filed his naturalization petition, invoking Section 701 of the 1940 Act, on May 10, 1978. The designated naturalization examiner recommended denial of the petition (Pet. App. 25a-33a). The examiner noted that respondent could not qualify for naturalization under the current provision for naturalization of alien servicemen, 8 U.S.C. (& Supp. V) 1440 (see page 7 note 7, *supra*), and that 8 U.S.C. 1421(e) precludes naturalization under expired or superseded statutory authority. Because respondent had not claimed that he sought naturalization under Section 701 in a timely manner, and because respondent had actually been in Pennsylvania for much of the time overseas naturalization under the extraordinary provisions of Section 702 was unavailable in the Philippines, the examiner concluded that respondent could not be deemed constructively to have timely filed his petition under the 1940 Act; respondent's petition was therefore barred by 8 U.S.C. 1421(e). Similarly, given these facts, the examiner found that *Hibi* barred relief on an

estoppel theory and, notwithstanding *68 Filipinos*, that respondent had not suffered any denial of due process.

The district court granted respondent's petition without reaching the merits of respondent's constitutional claim, treating the matter as a routine application of the doctrine of offensive nonmutual collateral estoppel governed by *Parklane Hosiery Co.* v. *Shore*, *supra*.[15] Although the naturalization examiner had noted (Pet. App. 31a) that the effect of 8 U.S.C. 1421(e) had not been considered in *68 Filipinos*, and that respondent, unlike the *68 Filipinos* petitioners, had been in Pennsylvania for most of the relevant time period, the district court did not address the legal effect of these circumstances.

2. The Solicitor General authorized an appeal.[16] The government once again argued that respondent's constitutional claim was nonjusticiable, and in any event without merit. Several arguments not considered in *68 Filipinos* were also advanced. The government argued that: (1) respondent's constitutional claim was barred by laches; (2) naturalization under Section 701 was barred by 8 U.S.C. 1421(e); (3) the remedy awarded for the alleged constitutional violation—naturalization—was tantamount to an equitable estoppel, and thus inconsistent with *Hibi*; and (4) respondent lacked standing to complain of the withdrawal of a naturalization officer from the Philippines, and had suffered no personal deprivation of rights, because he was in Pennsylvania for most of the period in question. The court of appeals affirmed, reaching only the collateral estoppel issue.[17]

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[15] The district court's decision was rendered prior to the Second Circuit's ruling in *Olegario*.

[16] Like Olegario, respondent is a "Category II" veteran and had not filed his petition in time to benefit from the Solicitor General's "grandfather rule" (see page 13 note 14, *supra*).

[17] The court of appeals stated that because respondent may have been in the Philippines for as much as three months during which time he was eligible for naturalization but no naturalization official

The court of appeals concluded that, under *Parklane Hosiery*, the district court did not abuse its discretion in applying collateral estoppel to bar consideration of the government's arguments against respondent's naturalization. The court of appeals stated that none of the circumstances listed by this Court in *Parklane Hosiery* (439 U.S. at 329-331 & nn. 14 & 15) as factors precluding an estoppel was present here. The court also stressed the lack of record support for the government's suggestion that the withdrawal of the appeal in *68 Filipinos* was based in part upon a misapprehension of the practical consequences of doing so, and it questioned whether the underlying issue was of sufficient practical importance to warrant a fresh determination of the legal issue (Pet. App. 12a-15a). The court of appeals acknowledged the conflicting decision of the Second Circuit in *Olegario*, but it rejected the Second Circuit's analysis of the collateral estoppel issue (*id.* at 18a) and held that the Second Circuit's ruling on the underlying merits, although contrary to *68 Filipinos*, was not sufficient reason to deny preclusive effect to *68 Filipinos* (*id.* at 16a-18a).

Finally, the court of appeals rejected the government's contention that *Parklane Hosiery* is inapposite because of the special attributes and interests of the United States as a litigant, and the purely legal character of the questions presented here (Pet. App. 18a-20a). Although it acknowledged that "the government is frequently involved in cases raising issues of great public importance, and that in such cases the public interest in permitting the government to relitigate those issues may outweigh the public interest in avoiding needless litigation" (*id.* at 18a), the court concluded that this is not such a case because it found "no 'critical' need for redetermination" of

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was present, "this is * * * sufficient * * * to implicate his due process rights and place him in the same situation as [the] Category II veterans" whose rights were litigated in *68 Filipinos* (Pet. App. 12a n.8). The court did not address the remaining issues raised by the government that had not been decided in *68 Filipinos*.

the issue and "no compelling public interest in opposing naturalization" of persons such as respondent (*id.* at 19a, 20a). On the contrary, the court thought that the equities strongly supported preclusion (*id.* at 20a-21a).

SUMMARY OF ARGUMENT

The decision of the court of appeals is without precedent. To our knowledge no other appellate court has ever held that the United States may be estopped from litigating a pure question of law, much less a question of constitutional law affecting the special prerogatives of the Executive in the sphere of foreign relations, by the unappealed adverse decision of a trial level court rendered in a different action involving a different opposing party.

A. Contrary to the view of the court of appeals, *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979), is not controlling here. In *Parklane Hosiery*, the issues upon which preclusion was upheld were factual (see *id.* at 324); here, the underlying issue in dispute is an unmixed question of law, indeed a significant question of constitutional law. This Court has recognized that powerful considerations militate against extension of the preclusion doctrine to purely legal issues—especially those of constitutional import—even when the parties in the successive lawsuits are the same. *Montana* v. *United States*, 440 U.S. 147, 162-163 (1979); *United States* v. *Moser*, 266 U.S. 236, 242 (1924). Application of the preclusion doctrine to a legal issue where there is no identity of parties is especially inappropriate.

B. In *Montana* v. *United States*, *supra*, 440 U.S. at 155, and *Parklane Hosiery Co.* v. *Shore*, *supra*, 439 U.S. at 331, this Court stressed that issue preclusion should not be applied in circumstances where such application would be unfair to a litigant or contrary to significant public policies. The unique attributes and role of the United States as a litigant constitute a special factor that warrants such an exception.

First, application of the issue preclusion doctrine in cases involving the United States must take account of the public interest in the uniform and rigorous enforcement of laws of general importance and applicability. See *Standefer* v. *United States*, 447 U.S. 10, 24-25 (1980); *INS* v. *Hibi*, 414 U.S. 5, 8 (1973). Here, as in *Standefer*, this public interest outweighs the considerations that ordinariiy underlie the preclusion doctrine.

Second, critical practical and legal considerations, applicable whenever the United States is engaged in litigation on questions of public law, argue strongly against the estoppel invoked by the court of appeals. The government is involved in far more litigation than any other party. Moreover, many legal issues of substantial public importance arise only in government litigation. There is a substantial likelihood that, in litigating a recurring issue, the government will at some point encounter an adverse decision. Application of collateral estoppel to bar determination of a legal question in such cases, which include the present one, would substantially disrupt the existing process of development of the law through resolution of conflicts by appeal, en banc review and certiorari, by supplanting the more flexible doctrine of *stare decisis* and the persuasive effect of decisions of coordinate courts with the rigid doctrine of issue preclusion.

Third, invocation of collateral estoppel against the government on recurring legal issues is inappropriate because, through the Office of the Solicitor General, the government, unlike any other litigant, employs a formal and selective mechanism for determining whether to take an appeal from or seek certiorari review of an adverse judgment. The Solicitor General frequently decides against appeal or certiorari even though the legal conclusions of the deciding court are believed to be erroneous. Such decisions rest upon factors including a substantial measure of prosecutorial discretion, equitable and policy considerations, the practical importance of the decision, the limited resources of the government and sensitivity to

crowded dockets of the courts. The decision not to pursue an appeal in *68 Filipinos* was based on several of these factors.

The court of appeals' ruling, if sustained, would require the United States to reconsider its practice of selective pursuit of appeals and certiorari. The existing practice benefits the public interest and facilitates sound judicial management. The alternative—an inflexible policy of appealing (and even seeking certiorari on) the first adverse decision rendered on a legal issue—would burden the courts of appeals and this Court unnecessarily. Judicial economy—the touchstone of the preclusion doctrine—would be disserved.

C. Even if, contrary to our submission, the special status of the government does not warrant consideration in the application of collateral estoppel, and *Parklane Hosiery* is controlling here, the court of appeals erred in approving application of the issue preclusion doctrine in the circumstances of this case.

First, the district court's decision in *68 Filipinos* given preclusive effect is contrary to intervening decisions of a court of appeals and numerous district courts. Second, the court below improperly precluded the United States from litigating not only the issues decided in *68 Filipinos* but also alternative contentions that were never addressed in the earlier case. Third, the facts of this case are materially different from those considered in *68 Filipinos* because respondent was not prejudiced by the challenged government actions. Finally, the court of appeals overlooked the substantial tension between the district court's decision in *68 Filipinos* and this Court's decision in *INS* v. *Hibi*, *supra*. Due regard for the authority of this Court's rulings required the court of appeals independently to assess the merits of respondent's claim.

ARGUMENT

THE UNITED STATES MAY NOT BE COLLATERALLY ESTOPPED FROM LITIGATING THE LEGAL QUESTION WHETHER RESPONDENT IS ENTITLED TO BECOME A NATURALIZED CITIZEN BY THE JUDGMENT OF A DISTRICT COURT IN A PRIOR CASE INVOLVING DIFFERENT PARTIES

A. Collateral Estoppel is Inapplicable to an Unmixed Question of Law Arising upon the Successive Claims of Different Parties

The court of appeals viewed this case as a routine application of the doctrine of nonmutual offensive collateral estoppel, which this Court sanctioned—albeit conditionally—in *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979). See Pet. App. 9a-11a. The issue in *Parklane Hosiery*, however, was whether the potential for unfairness that infects the issue preclusion doctrine when a plaintiff seeks to foreclose a defendant from litigating an issue that the defendant has previously litigated unsuccessfully in an action with another party is so pervasive that resort to the doctrine should be barred in all cases. 429 U.S. at 324, 326 n.4, 331. In providing a negative answer to that question, the Court stressed that care must be taken to ensure that collateral estoppel is not applied in circumstances where such use would for any reason "be unfair to a defendant." *Id.* at 331. Moreover, nothing in the Court's opinion dispenses with the established limitations on the issue preclusion doctrine developed in other cases. The court of appeals erred in disregarding these established exceptions to and limitations upon the rule of collateral estoppel.

For instance, the issue whose redetermination was barred in *Parklane Hosiery* was, unlike the underlying issue in this case, factual. 439 U.S. at 324. This Court's focus in cautioning against improper resort to collateral estoppel accordingly was upon circumstances that would militate against precluding relitigation of factual issues. 439 U.S. at 331. See *Standefer* v. *United States*, 447

U.S. 10, 21 (1980). Thus, it is hardly surprising that the court of appeals was able to conclude (Pet. App. 11a-16a & n.11) that none of the arguments against use of collateral estoppel specifically mentioned in *Parklane Hosiery* is present here.[18] This case, by contrast, is governed by the pre-existing exception to the rule of collateral estoppel applicable to pure questions of law arising in successive actions on substantially unrelated claims—an exception recognized in *United States* v. *Moser*, 266 U.S. 236, 242 (1924), and recently acknowledged in *Montana* v. *United States*, 440 U.S. 147, 162-163 (1979).

1. The Court defined the "unmixed questions of law" exception to the rule of collateral estoppel in *Montana* v. *United States*, *supra*, 440 U.S. at 162, quoting *United States* v. *Moser*, *supra*, 266 U.S. at 242 (emphasis added by the *Montana* Court):

> Where * * * a court in deciding a case has enunciated a rule of law, the parties in a subsequent action *upon a different demand* are not estopped from insisting that the law is otherwise, merely because the parties are the same.

See also *Restatement (Second) of Judgments* § 28(2) & comments b & c, § 29(7) & comment i (1982). This rule applies with special force when the issues of law are of constitutional dimensions (*Montana* v. *United States*, *supra*, 440 U.S. at 163):

> Unreflective invocation of collateral estoppel against parties with an ongoing interest in constitutional issues could freeze doctrine in areas of the law where responsiveness to changing patterns of conduct or social mores is critical.

The question presented to the district court for decision in this case—whether the Attorney General violated

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[18] As explained below (pages 37-38), however, the court of appeals' decision does not in fact comport with the Court's cautionary warnings in *Parklane Hosiery*.

the Due Process Clause by failing to station an authorized naturalization representative in the Philippine Islands throughout the time citizenship was available under Section 701—is an unmixed question of law. This Court treated the closely related question presented in *Hibi* in terms of equitable estoppel doctrine as purely legal. 414 U.S. at 8-9; compare *id.* at 9-11 (Douglas, J., dissenting). Similarly, the district court in *68 Filipinos* regarded the question decided there as one of purely legal dimensions. 406 F. Supp. at 948-951. The court of appeals did not suggest that the issue presented in this case is other than purely legal. See Pet. App. 17a & n.14, 20a n.15, 21a (estoppel applied to "the constitutional issues decided in *68 Filipinos*"); see also *Barretto* v. *United States*, 694 F.2d 603, 607 (9th Cir. 1982).[19] Instead, the court below simply asserted (Pet. App. 18a), in reliance on *Montana*, that "[i]t is by now well settled * * * that collateral estoppel * * * may be invoked on * * * pure issues of law."

Contrary to the court of appeals' assertion, however, *Montana* v. *United States*, *supra*, does not support this sweeping proposition. It is true that the Court there upheld the application of collateral estoppel to preclude determination of a question of law. But the doctrine applied in *Montana* was, in practical effect, res judicata. The Court applied the collateral estoppel label because the government had undertaken the first round of litigation through a proxy (see page 23, *infra*). 440 U.S. at 154-155. Moreover, the Court's decision in *Montana* rests upon its conclusion that the case entailed an effort to relitigate a claim not meaningfully distinguishable from that previously adjudicated. The Court explained (440 U.S. at 163): "[T]he legal 'demands' of this litigation are closely aligned in time and subject matter to those

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[19] The court of appeals' decision in *Barretto*, which reaffirms and extends its decision in this case, is reproduced in the appendix to the government's reply brief in support of the petition in this case.

in [the prior case]." The Court's holding thus rests upon the distinction, recognized in *Moser* itself, between reconsideration of a "rule of law" announced in a prior case "upon a different demand," and redetermination of "a fact, question or right distinctly adjudged in the original action." Under *Moser*, as reaffirmed in *Montana*, preclusion is impermissible in the former situation, but permissible in the latter. 440 U.S. at 162-163, quoting 266 U.S. at 242.

The Court recognized in *Montana* (440 U.S. at 163) that "the scope of the *Moser* exception may be difficult to delineate, particularly where there is partial congruence in the subject matter of successive disputes." But in the circumstances of this case there can be little doubt that preclusion is improper, for respondent's claim of eligibility to become a naturalized citizen presents, by definition, a "different demand" from the separate naturalization petitions of the individual petitioners in *68 Filipinos*. See *Montana* v. *United States*, *supra*, 440 U.S. at 154. The rights of respondent were in no sense "distinctly adjudged" in the earlier litigation.

Of course, in *Montana* itself the Court applied preclusion even though the plaintiff, the United States, had not formally participated as a named party in the prior adjudication. 440 U.S. at 155. The Court concluded that there was no reason to prevent the operation of collateral estoppel simply because the causes of action in successive cases against the same defendant were technically distinct, because in the first action the government had litigated by proxy, financing and controlling the earlier case. *Id.* at 154-155. Here, however, respondent's claim was not presented vicariously or otherwise in the prior action. There is accordingly no reason to treat that claim as indistinguishable for preclusion purposes from the individual claims of the veterans that were before the district court in *68 Filipinos*.

Indeed, in so treating respondent's claim the court of appeals retrospectively converted *68 Filipinos* into a

class action of sorts, holding that the *68 Filipinos* judgment binds the United States as against any Filipino veteran who may hereafter seek naturalization under Section 701. But *68 Filipinos* was not certified as a class action and the government accordingly had no reason to expect that its failure to prosecute the appeal in *68 Filipinos* would bind it in all future cases. See *Baxter* v. *Palmigiano*, 425 U.S. 308, 311 n.1 (1976). Thus, by lending preclusive force to the legal holding of *68 Filipinos* in litigation brought by unrelated claimants, the court of appeals upset the reasonable expectations of the government as a litigant.

2. In treating the naturalization petitions of different individuals as presenting a single "demand" for purposes of the "unmixed question of law" exception to collateral estoppel, the court of appeals also divorced collateral estoppel from the fundamental purposes served by the preclusion doctrine: "protecting litigants from the burden of relitigating an identical issue with the same party or his privy" and "promoting judicial economy." *Parklane Hosiery* v. *Shore*, *supra*, 439 U.S. at 326. Plainly the first of these purposes is not served by preclusion on the legal issue in this case—respondent is not asked to bear the burden of relitigating any issue that he has previously litigated. In fact, respondent cannot fairly be said to bear any untoward burden at all; assuming that collateral estoppel does not apply he will merely be required to establish his qualifications for admission to United States citizenship.

Judicial economy is likewise little served by preclusion in the circumstances of this case, because no trial or other evidentiary proceedings would have been required to decide respondent's legal claim. The underlying legal issues were fully briefed and argued to the district court and the court of appeals. To be sure, the courts below were spared the labor of actually deciding the claim, but any economy achieved is a false one. As we explain below pages 30-34), if collateral estoppel bars redetermi-

nation of legal issues such as that presented here in subsequent unrelated cases, the government will be obliged to pursue appeals in an uncritical manner, abandoning the selective appeal policy currently in effect, and imposing substantial burdens upon the courts of appeals and this Court. In short, the court of appeals' analysis will retard rather than advance the pursuit of judicial economy.

3. The underlying issue in this case—whether respondent is entitled to naturalization because of an alleged denial of due process in the administration of Section 702 in the Philippines in 1945 and 1946—is, of course, one of constitutional law. Because Congress has no power to correct the decision in *68 Filipinos* by legislation, the effect of the court of appeals' decision is especially onerous. And it is significant that the decision in *68 Filipinos*, which is effectively accorded the force of a decision of this Court by the decision below, trenches upon the constitutional authority of the Executive to conduct the foreign relations of the United States (Art. II, § 2) and the authority of Congress to "establish a uniform Rule of Naturalization" (Art. I, § 8, Cl. 4). Accordingly, the court's warning against "[u]nreflective invocation of collateral estoppel against parties with an ongoing interest in constitutional issues" (*Montana* v. *United States*, *supra*, 440 U.S. at 163) applies with special force here.

B. Collateral Estoppel Should Not Be Applied Against The Government To Preclude Determination Of Recurring Questions Of Public Law

Any ambiguity in the application of the *Moser* exception to the issue preclusion doctrine is removed by consideration of the additional circumstances that set this case apart from *Parklane Hosiery* and *Montana*. As the Court recognized in *Montana*, collateral estoppel is inapplicable whenever "special circumstances warrant an exception to the normal rules of preclusion." 440 U.S. at

155. And in *Parklane Hosiery*, the Court stated that courts should not apply collateral estoppel whenever for the reasons there discussed or for any "other reasons, the application of offensive [collateral] estoppel would be unfair to a defendant." 439 U.S. at 331. We submit that the unique attributes and role of the United States as a litigant strongly militate against application of the issue preclusion doctrine to the government, particularly when it is engaged in the uniquely sovereign function of enforcing the public law.

1. This Court recognized these unique attributes in *Standefer* v. *United States*, 447 U.S. 10 (1980), in declining to apply the rule of nonmutual collateral estoppel announced in *Parklane Hosiery* and *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313 (1971), against the government in a criminal case. The Court stated, in terms that are fully applicable here (447 U.S. at 24-25):

> Finally, this case involves an ingredient not present in either *Blonder-Tongue* or *Parklane Hosiery*: the important federal interest in the enforcement of the criminal law. *Blonder-Tongue* and *Parklane Hosiery* were disputes over private rights between private litigants. In such cases, no significant harm flows from enforcing a rule that affords a litigant only one full and fair opportunity to litigate an issue, and there is no sound reason for burdening the courts with repetitive litigation.
>
> That is not so here. The court of appeals put the point well:
>
> > "[T]he purpose of a criminal court is not to provide a forum for the ascertainment of private rights. Rather it is to vindicate the public interest in the enforcement of the criminal law while at the same time safeguarding the rights of the individual defendant. The public interest in the accuracy and justice of criminal results is greater

> than the concern for judicial economy professed in civil cases and we are thus inclined to reject, at least as a general matter, a rule that would spread the effect of an erroneous acquittal to all those who participated in a particular criminal transaction. To plead crowded dockets as an excuse for not trying criminal defendants is in our view neither in the best interests of the courts, nor the public." 610 F.2d. at 1093.

In short, this criminal case involves "competing policy considerations" that outweigh the economy concerns that undergird the estoppel doctrine.

The fact that this case is not a criminal prosecution does not dilute the strength of the factors canvassed in *Standefer*. Whenever the government acts in its sovereign capacity to enforce the public laws, public policy dictates the applicability of the *Standefer* analysis. This is especially so where, as here, the government acts to ensure enforcement of the immigration and naturalization laws, which this Court has recognized as "[a]n increasingly important interest • • • of broad public concern." *INS* v. *Miranda*, No. 82-29 (Nov. 8, 1982), slip op. 5; see also *Fedorenko* v. *United States*, 449 U.S. 490, 506-507 (1981). As the Court recognized in *INS* v. *Hibi*, *supra*, 414 U.S. at 8: "[T]he Government is not in a position identical to that of a private litigant with respect to its enforcement of laws enacted by Congress. • • • [I]n enforcing the cutoff date established by Congress [in Section 701, the INS] is enforcing public policy established by Congress."

Numerous practical and legal considerations, applicable in criminal and non-criminal cases alike, also set the United States apart from any other litigant and argue strongly against the estoppel invoked by the court of appeals. First, the government is involved in far more litigation than any other party.[20] In 1982, for instance, the

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[20] In 1982, the United States was a party to 75,773 civil cases filed in the United States District Courts, out of a total of 206, 193 filings. Administrative Office of the United States Courts, *Annual Report of*

Solicitor General acted upon recommendations respecting the desirability of appellate, en banc or certiorari review of a decision adverse to the government in over 2,100 cases. Second, many of the issues of greatest public importance, including constitutional issues, arise only in litigation to which the government is a party; others are characteristically associated with government litigation. See *American Medical International, Inc.* v. *Secretary of HEW*, 677 F.2d 118, 121 n.24 (D.C. Cir. 1981). Third, the government, unlike other litigants, necessarily finds itself in litigation presenting a particular legal issue in a host of jurisdictions—indeed potentially (and not uncommonly) in every district and circuit. In such cases, which include the present one, the potential unfairness of invoking the preclusion doctrine absent mutuality (see *Parklane Hosiery Co.* v. *Shore*, *supra*, 439 U.S. at 330 & n.14) is necessarily present, for there is a substantial likelihood that in litigating a recurring issue, the government will at some point encounter an adverse decision.

Because of these unique attributes of government litigation, application of collateral estoppel in the circumstances of cases such as the present one would substantially disrupt the existing process of development of the public law. In that system courts of coordinate rank are not bound by each other's decisions on questions of law. See, *e.g.*, *Frock* v. *United States Railroad Retirement Board*, 685 F.2d 1041, 1046 (7th Cir. 1982) ("Federal appellate courts can, and do, differ in their conclusions as to the law * * *" (footnote omitted)). Instead, the courts apply the more flexible doctrine of *stare decisis*, and give such persuasive effect as is due in a particular case to the decisions of coordinate courts from other jurisdictions and the decisions

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the Director 98 (1982). In the same year the United States was a party to 5,517 of 18,784 civil cases appealed from the district courts to the courts of appeals as well as 4,767 criminal appeals and 3,118 original actions to review the decision of an administrative agency. *Id.* at 79, 82.

of inferior courts.[21] The law emerges through the hierachical process of appeal, en banc review and, in proper cases, certiorari.

Issue preclusion in private litigation—even if extended to legal questions—ordinarily does not unduly undermine this process of development of the law because no single litigant is party to more than a small fraction of factually unrelated cases presenting a common legal question. By contrast, the government is characteristically, if not invariably, a party to litigation on public law questions. Accordingly, application of collateral estoppel when the government has unsuccessfully litigated a question of law in any court inferior to this one would freeze the development of the law. Yet this Court has repeatedly recognized the value of allowing independent consideration of legal issues by the various courts of appeals. See, *e.g.*, *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979); *E.I. duPont de Nemours & Co.* v. *Train*, 430 U.S. 112, 135 & n.26 (1977). Of course, that practice is a centerpiece of the Court's scheme for administering its certiorari jurisdiction. Sup. Ct. R. 17.1(a).[22]

Like the Second Circuit in *Olegario* (see pages 13-14, *supra*), the courts of appeals have generally recognized that these considerations preclude application of collateral

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[21] The court of appeals' suggestion (Pet. App. 17a) that the considerations we have canvassed might be more weighty when an issue arises in two different circuits simply illustrates the court's failure to recognize the difference between collateral estoppel and *stare decisis*. Under the court of appeals' analysis the decision of a single district court may be binding upon a court of appeals, while the authority of decisions of one or more courts of appeals, even those rendered en banc, may be regarded as merely persuasive.

[22] On those rare occasions when Congress has wished to make the decision of a single court of appeals respecting a particular issue final save only for review by this Court, it has done so explicitly, by designating a single forum for litigation of questions of nationwide importance. See, *e.g.*, Section 211(b)(1) of the Economic Stabilization Act of 1970, 12 U.S.C. 1904 note; Section 307(b)(1) of the Clean Air Act, 42 U.S.C. (Supp. IV) 7607(b)(1).

estoppel to the government on recurring legal issues. *American Medical International, Inc.* v. *Secretary of HEW*, *supra*, 677 F.2d at 121-124; *Western Oil & Gas Ass'n* v. *EPA*, 633 F.2d 803, 808 (9th Cir. 1980); *Divine* v. *Commissioner*, 500 F.2d 1041 (2d Cir. 1974). The American Law Institute also has recognized that preclusion is inappropriate when

> The issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based * * *.

Restatement (Second) of Judgments § 29(7) (1980). Thus, when "the party against whom the rule of preclusion is to be applied is a government agency responsible for continuing administration of a body of law applicable to many similarly situated persons * * * the rule of preclusion should ordinarily be superseded by the less limiting principle of *stare decisis*." *Id.* at § 29 comment i; see also *id.* at § 28(2) & comment c.[23]

2. Furthermore, invocation of collateral estoppel against the government on legal issues of public importance is inappropriate because, through the Office of the Solicitor General, the government, unlike any other litigant, employs a formal mechanism for determining whether to take an appeal from or seek certiorari review of an adverse judgment. See 28 C.F.R. 0.20. This process is rather selective, particularly at the certiorari stage.[24] Moreover,

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[23] The Restatement also cautions against use of collateral estoppel "when the issue was determined in the first action by a trial court and in the second action will probably be taken to an appellate court," and when "the issue is of general interest and has not been resolved by the highest appellate court that can resolve it." *Restatement (Second) of Judgments*, § 29 comment i. The decision of the court of appeals disregards these strictures as well.

[24] In 1982 the Solicitor General decided against appeal to a court of appeals from an adverse district court judgment in 621 of the 1,118 cases submitted for his consideration. Moreover, notwithstanding the substantial volume of appellate litigation in which the gov-

to a degree not approached by any private party, the government regularly takes into account factors other than its narrow interest in prevailing in a particular lawsuit in determining whether to seek further judicial review. As a result, the Solicitor General frequently decides against appeal or certiorari, in cases where the legal conclusions of the deciding court are believed to be erroneous.[25] Such decisions rest upon a host of other factors, including: a substantial measure of prosecutorial discretion, equitable and policy considerations, the perceived practical importance of the decision, recognition of the limited resources of the government and sensitivity to crowded dockets of the courts.[26] As we have explained above (pages 11-12 & note 12), the decision not to pursue an appeal in *68 Filipinos* was just such a decision.

The fact that the Solicitor General authorized withdrawal of the appeal in *68 Filipinos* does not affect the

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ernment is engaged (see page 28 note 20, *supra*), the Solicitor General authorized filing of a petition for a writ of certiorari in only 64 of the 579 cases in which formal consideration was given to seeking such review in 1982.

[25] The Solicitor General often acquiesces in the grant of a petition for a writ of certiorari to review a judgment favorable to the United States where a conflict between the circuits has developed. In many such instances, the conflicting decision adverse to the government is one that, although regarded as (and later held by this Court to be) erroneous, did not provoke the filing of a petition for a writ of certiorari. See, *e.g.*, *Howe* v. *Smith*, 452 U.S. 473, 479 (1981); *Steadman* v. *SEC*, 450 U.S. 91, 95 (1981); *Lewis* v. *United States*, 445 U.S. 55, 58 & n.4 (1980). See also *Tuten* v. *United States*, No. 81-6756 (Mar. 30, 1983), slip op. 3 n.3.

[26] See, *e.g.*, Note, *The Solicitor General and Intragovernmental Conflict*, 76 Mich. L. Rev. 324, 324-330 (1977); Carrington, *United States Appeals in Civil Cases*, 11 Hous. L. Rev. 1101, 1101-1105 (1974); Bork, *The Problems and Pleasures of Being Solicitor General*, 42 A.B.A. Antitrust L. J. 701 (1973); Note, *Government Litigation in the Supreme Court: The Roles of the Solicitor General*, 78 Yale L. J. 1442, 1453-1457 (1969); Sobeloff, *Attorney for the Government: The Work of the Solicitor General's Office*, 41 A.B.A.J. 229 (1955).

proper analysis here. The United States, even as a litigant, does not abandon its role as the government. *INS* v. *Hibi*, *supra*, 414 U.S. at 8. As this Court has remarked, "[t]here is, of course, no rule of law to the effect that the Government must be consistent in its stance in litigation over the years. It has changed positions before." *Barrett* v. *United States*, 423 U.S. 212, 222 n.6 (1976). See also *NLRB* v. *Iron Workers*, 434 U.S. 335, 351 (1978); *Dixon* v. *United States*, 381 U.S. 68, 70-75 (1965); *Automobile Club* v. *Commissioner*, 353 U.S. 180, 183 (1957). As this case illustrates, the political process by which the United States changes policies from time to time in a democratic society is itself a powerful reason to preclude collateral estoppel against the government on matters of public law. Indeed, the decision of the court of appeals permits one administration to bind its successors even on questions of constitutional law. Contrary to respondent's suggestion (Br. in Opp. 13), the government did not in any relevant sense "concede[] the validity of the district court's judgment" by withdrawing the appeal in *68 Filipinos*. Of course, the government thereby bound itself not to challenge the judgment itself (see *Federated Department Stores* v. *Moitie*, 452 U.S. 394 (1981))—an obligation the government has more than fulfilled (see page 12 note 13, *supra*)—but it did not acquiesce thereby in the correctness of the district court's legal ruling.[27]

Nor is there any anomaly in the Department of Justice's reconsideration of its legal position on naturalization of Filipino veterans. The present position of the United States is quite simply that *68 Filipinos* was wrongly decided; the withdrawal of the earlier appeal did not reflect any different view. Respondent's suggestion (Br.

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[27] "The estoppel doctrine," as this Court noted in *Standefer* v. *United States*, *supra*, 447 U.S. at 23 n.18, "is premised upon an underlying confidence that the result achieved in the initial litigation was substantially correct." As this case shows, the government's failure to seek appellate review is not an accurate indicator that the adverse decision was correctly decided. See also page 31 & note 25, *supra*.

in Opp. 14), echoing the court of appeals (Pet. App. 12a, 13a, 15a), that the government has not adequately justified its change in position assumes that the United States has an obligation to justify its litigating conduct to the courts. That assumption is inconsistent with fundamental principles of our adversary system of justice, see *Hickman* v. *Taylor*, 329 U.S. 495, 510-512 (1947); cf. 5 U.S.C. 552(b)(5); Fed. R. Civ. P. 26(b)(3), and raises serious questions of separation of powers.

The government's practice of selective pursuit of appellate review benefits the public interest and facilitates sound judicial management. Adoption of the broad preclusion rule applied by the court of appeals would compel the United States to reconsider this salutary practice. Instead, the government would be obliged to consider an inflexible policy of appealing (and even seeking certiorari on) the first adverse decision rendered on a legal issue lest further review be foreclosed. See *Olegario* v. *United States*, *supra*, 629 F.2d at 215. As a result, the courts of appeals and this Court would be burdened prematurely and unnecessarily, and judicial economy—the touchstone of the preclusion doctrine—would be disserved.[28] More-

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[28] *United States* v. *Stauffer Chemical Co.*, 684 F.2d 1174 (6th Cir. 1982) ("*Stauffer II*"), cert. granted, No. 82-1448 (Apr. 18, 1983), well illustrates these considerations. There the court of appeals held that the government was collaterally estopped on a question of interpretation of a provision of the Clean Air Act by the decision of the Tenth Circuit on the same issue in *Stauffer Chemical Co.* v. *United States*, 647 F.2d 1075 (1981), aff'g 14 Env't Rep. Cases 1737 (D. Wyo. 1980) ("*Stauffer I*"), notwithstanding the contrary decision of the Ninth Circuit on that same issue in *Bunker Hill Co.* v. *EPA*, 658 F.2d 1280 (1981), aff'g Civ. No. 80-2087 (D. Idaho Oct. 15, 1980). The Sixth Circuit commented (684 F.2d at 1181):

> If EPA really believed that the decision of the Tenth Circuit in *Stauffer I* was wrong, it could have petitioned the Supreme Court for certiorari, but it did not avail itself of that remedy, and it is too late to do so now. EPA cannot collaterally attack the Tenth Circuit decision in the present case.

It is true that the government did not seek certiorari in *Stauffer I*. But at the time the case was decided there was no conflicting deci-

over, because of the limited docket of this Court, and the proliferation of statutes and litigation in recent years, constructions of the law that this Court might ultimately determine to be erroneous would more often be given finality. See, *e.g.*, *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512 (1982) (rejecting the view of four courts of appeals); *United States* v. *Foster Lumber Co.*, 429 U.S. 32 (1976) (rejecting the view of three courts of appeals); *NLRB* v. *Enterprise Ass'n of Pipefitters*, 429 U.S. 507 (1977) (rejecting the view of five courts of appeals). Plainly, there is no interest served by invocation of collateral estoppel in the circumstances of this case that would justify these detrimental consequences.[29]

3. Contrary to respondent's contention (Br. in Opp. 5-7) and the view of the court of appeals (Pet. App. 18a), *Montana* v. *United States*, *supra*, does not support the application of collateral estoppel in the circumstances of this case. As explained above (pages 21-25), this case, unlike *Montana* itself, plainly calls for the application of the "unmixed question of law" exception to the doctrine of issue preclusion.[30] *Montana* is also distinguishable be-

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sion of any court of appeals. Moreover, the pendency in the Ninth Circuit of *Bunker Hill*—an appeal from a district court decision favorable to the government on the statutory question—together with the pendency in the Sixth Circuit of Stauffer's appeal from the district court decision in *Stauffer II* that also favored the government necessarily counseled against application to this Court for further review in *Stauffer I*. Any other course would have disserved both the Court and those litigants who compete for a spot on its limited docket.

[29] At a minimum there is no basis for the court of appeals' assertion (Pet. App. 15a) that "[i]t should have come as no surprise to the government" that Judge Renfrew's decision in *68 Filipinos* would reach the claim of every Filipino veteran. As noted above, *68 Filipinos* was not a class action. Moreover, *Parklane Hosiery* had not been decided at the time the *68 Filipinos* appeal was withdrawn.

[30] As explained below (pages 39-42), the applicability of the *Moser* exception is especially clear here for the additional reason that the facts of this case are materially different from those addressed in *68 Filipinos*.

cause the circumstances presented there may essentially have called for application of res judicata principles.

More fundamentally, the policy and practical considerations we have outlined above (pages 25-34) had little application in *Montana*, for the issue presented in that case could arise in only two forums—the Montana state courts and the United States District Court for Montana. This consideration is especially significant because in *Montana*, unlike here, the government had engaged in conduct that may implicate the core concerns underlying the preclusion doctrine. It had litigated the issue to a conclusion in the Supreme Court of Montana, noted an appeal to this Court, then dismissed the appeal and pursued its parallel action in the federal court. The federal action, moreover, was filed just after the action in state court had been filed, and was stayed upon the government's stipulation pending resolution of the state court litigation. *Montana* is further disinguishable because the issue there was not one involving a body of law applicable to a class of similarly situated persons, but one affecting the proprietary interest of the United States. Accordingly, the government did not argue in *Montana*, as it does here, that application of the preclusion doctrine was inappropriate in light of its special attributes and responsibilities, and the Court's opinion does not reflect any view respecting our present contentions.

4. Both the court of appeals (Pet. App. 19a) and respondent (Br. in Opp. 12, 16) appear to acknowledge that collateral estoppel should not be applied against the government in some cases presenting legal issues. But because the court below saw no " 'critical' need for redetermination" of the underlying constitutional issue (Pet. App. 19a), saw no "compelling public interest in opposing the naturalization" of persons such as respondent (*id.* at 20a) and believed that the equities favored respondent (*id.* at 20a-21a), it held that the government was precluded from relitigating the constitutional issues pre-

sented here. None of these considerations justifies the court of appeals' decision.

The court of appeals' necessarily subjective conclusions regarding the "critical need for redetermination" and "compelling public interest" provide no standard for accurate prediction of which legal rulings, if not appealed by the government, would be given collateral estoppel effect in the future. Nor has respondent identified any objective criterion that could guide the government in its litigating decisions in the wake of the decision below. Because it is too late to reconsider whether to appeal by the time a court has decided in a subsequent case that a prior decision is binding, the decision of the court of appeals places the government in an unacceptable position. The court of appeals has arrogated to itself a standardless discretion to determine with the benefit of hindsight whether a fresh determination of the merits of a particular legal issue is in the public interest (see Pet. App. 20a).

In any event, the court of appeals erred in concluding that determination of the merits of the instant case is unwarranted. As explained above (page 27), the decisions of this Court, including *Hibi*, reflect that the enforcement of the naturalization laws in every individual case is of utmost public importance. The district court's holding in *68 Filipinos* that the actions of an Attorney General, taken for foreign policy reasons that the court acknowledged to be valid, violated the Due Process Clause is necessarily significant, without regard for the number of persons involved or the court of appeals' assessment of the equities. Moreover, while this Court's decision in *Hibi* makes clear that the equitable considerations mentioned by the court below are irrelevant to the merits of respondent's claim, it is particularly clear that these equities have no place in the calculus of decision where the issue is not whether respondent is entitled to naturalization, but only whether the United States is foreclosed from securing an adjudication of that question.

C. The Court of Appeals' Decision Disregards Other Established Limitations on the Issue Preclusion Doctrine

We have explained thus far that, because of the unique role of the government in enforcing the public law, nonmutual collateral estoppel on issues of law should never be applied against the United States. But even if that were not so generally, and *Parklane Hosiery* were regarded as controlling in government litigation, the court of appeals erred in approving application of that doctrine here.

1. The Court emphasized in *Parklane Hosiery* that the doctrine of nonmutual collateral estoppel must always be applied selectively and cautiously. 439 U.S. at 329-331. The Court mentioned, for example, that issue preclusion would be inappropriate when "the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant." *Id.* at 330; footnote omitted. Here, as the court of appeals acknowledged (Pet. App. 16a), Judge Renfrew's decision conflicts with the Second Circuit's subsequent decision in *Olegario*. See pages 13-14, *supra*. In addition, decisions inconsistent with *68 Filipinos* were rendered in *In re Kapili*, 473 F. Supp. 600 (E.D. N.Y. 1979); *In re Naturalization of Inton*, No. SA-79-CA-284 (W.D. Tex. July 3, 1980); *Pangilinan* v. *INS*, Pet. No. 251849 (N.D. Cal. Sept. 24, 1980); *Barretto* v. *United States*, Pet. No. 248806 (N.D. Cal. Aug. 15, 1980), and *Litonjua* v. *INS*, Pet. No. 23358-GT (S.D. Cal. Apr. 8, 1981). In view of this division of authority, the court of appeals should have taken an independent look at the merits of respondent's constitutional claim.

Of course, the district court decisions in the last three cases mentioned above were reversed by the Ninth Circuit, in reliance upon the decision in this case, citing *stare decisis* as the governing principle. *Barretto* v. *United States*, *supra*, 694 F.2d at 607.[31] But at the time the dis-

[31] In *Barretto* the court of appeals considered the naturalization applications of 16 Filipino "Category II" war veterans resting, like

trict court decisions in *Pangilinan*, *Barretto*, and *Litonjua* were rendered, the Second Circuit's decision in *Olegario* created a precedent in conflict with *68 Filipinos*. (By contrast, *Olegario* had not been decided when the district court ruled in the present case, although it had been decided prior to the time the court of appeals rendered its own decision.) Although the Ninth Circuit in *Barretto* refused to hold that the district courts' rejection of collateral estoppel was erroneous (694 F.2d at 607 n.9), the court of appeals, quite properly concerned about consistency of decision between this case and *Barretto*, invoked *stare decisis* to achieve the same result. In extending the holding of this case by means of *stare decisis* to cover cases first decided after *Olegario*, however, the court of appeals highlighted its original error in invoking collateral estoppel in this case.

The dilemma faced by the court of appeals in *Barretto* was of its own making. Because the claim presented in this case arises under a scheme of public law applicable to a class of persons, it was foreseeable (if not inevitable) when the court decided this case that cases such as *Barretto* would arise. Rather than employing *stare decisis* to extend the troublesome holding of this case to cover circumstances where the application of collateral estoppel was properly rejected by the district court, the court of appeals should have recognized that the very policies of "consistency and fairness" it invoked in *Barretto* (694 F.2d at 607) required it to reach the merits in the present case, rather than relying upon the artifice of collateral estoppel.

2. Other factors also should have precluded any estoppel here. As we have noted (page 15 & note 17), the court of appeals rested its decision entirely upon the preclusive

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respondent Mendoza's, upon Sections 701-705 of the 1940 Act and the due process theory endorsed by the district court in *68 Filipinos*. The facts and proceedings in *Barretto* are described in detail in our reply brief in support of the petition in this case (at 2-5).

effect of *68 Filipinos*, even though significant legal contentions not addressed by Judge Renfrew in that case were presented by the government throughout the litigation of respondent's claim. The court of appeals thus effectively applied the broader *res judicata* ("claim preclusion") doctrine, rather than collateral estoppel, to bar all arguments the United States might raise in answer to respondent's claim. See *Allen* v. *McCurry*, 449 U.S. 90, 94 & n.5 (1980). There can be no justification for the court of appeals' refusal to consider legal arguments that might have been, but were not, addressed in *68 Filipinos*.

Among the points the court of appeals simply did not address were arguments that respondent's claim is expressly barred by 8 U.S.C. 1421(e) and by laches, and that respondent is not entitled to naturalization because he suffered no prejudice, which is an essential element of any due process claim. The government also made additional arguments, not considered in *68 Filipinos*, that respondent's due process claim cannot be reconciled with this Court's decision in *Hibi*. The issues raised by the government that the court of appeals ignored are important ones, not previously litigated, that bear upon the uniformity and stability of administration of our nation's naturalization laws, the availability of judicial oversight of executive action in the sensitive sphere of foreign relations, and the *stare decisis* effect of this Court's rulings. Accordingly, the court of appeals' failure to limit the scope of collateral estoppel to those issues actually litigated and determined in a prior action is particularly troublesome.

3a. An equally remarkable feature of the decision below is the court's conclusion (Pet. App. 11a-12a n.8) that respondent's residence in Pennsylvania during most of the time a naturalization examiner was absent from the Philippines does not serve to distinguish him sufficiently from the petitioners in *68 Filipinos* to require an independent determination of his right to naturalization. It is fundamental that collateral estoppel has no application

where the facts of successive cases are in material respects different. *Montana* v. *United States*, *supra*, 440 U.S. at 158-159; *Commissioner* v. *Sunnen*, *supra*, 333 U.S. at 601.

While we question whether any person who made no effort to avail himself of the opportunity for naturalization provided by Section 701 of the 1940 Nationality Act should be heard to complain of the temporary absence of a naturalization official from the Philippines, it is far clearer that persons such as respondent can make no such claim. And even if, as the court of appeals thought, the facts of this case "*implicate*" respondent's due process rights (Pet. App. 12a n.8; emphasis added), there is no reason whatever to conclude that the holding of *68 Filipinos*, which takes no account of these facts, precludes a determination whether those rights were actually *violated*. By invoking collateral estoppel, the court of appeals thus failed to discharge its duty to determine whether, on the facts of this case, respondent is entitled to naturalization under the laws of the United States.[32]

b. Again the court of appeals' error is highlighted by its subsequent decision in *Barretto*. In that case individual petitioner Barretto, unlike the 15 other naturalization petitioners whose claims were considered, had filed his naturalization petition prior to withdrawal of the appeal in *68 Filipinos*. He thus arguably fell within the grandfather rule applied by the Solicitor General in cases arising before that date (see page 12 note 13, *supra*). Barretto's naturalization petition was nevertheless opposed by the INS because he could establish no prejudice resulting from the manner in which Section 702 had been administered in the Philippines. Barretto had spent the period February 1945 through June 10, 1946, in the United

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[32] Because of the differences between the facts of this case and those considered in *68 Filipinos*, this case, unlike *Montana* v. *United States*, *supra*, 440 U.S. at 163, plainly calls for application of the "unmixed question of law" exception to the doctrine of issue preclusion. See pages 20-25, *supra*.

States undergoing flight training, and had actually filed a preliminary application for naturalization under the 1940 Act while in the United States. That application had evidently been rejected because it lacked the necessary signature of his commanding officer. Twenty days after his return to the Philippines, Barretto was discharged from the United States armed forces and became ineligible for overseas naturalization under Section 702 of the 1940 Act. He thus was stationed in the Philippines for only 20 days when naturalization there under Section 702 was impossible because of the absence of a naturalization official.

The court of appeals nevertheless held that Barretto's situation was indistinguishable from that of other Category II veterans who filed their petitions in time to avail themselves of the "grandfather rule," and that *Mendoza* required that Barretto's petition be granted. 694 F.2d at 608-609. The court explained (*id.* at 608; emphasis added):

> In *Mendoza* we found that Dr. Mendoza's presence in the Philippines for as much as three months, after having been in the United States for several months, was sufficient to implicate Dr. Mendoza's due process rights, 672 F.2d at 1326 n.8; we know of no principled basis—and the government offers none—for drawing a line between three months in Dr. Mendoza's case and three weeks in this case. *If the government's conduct violated the constitutional rights of Filipinos serving in the United States armed forces in the Philippines, it violated their rights whether they were in the Philippines for nine months or nine days.*

The court of appeals' holding that neither respondent nor Barretto is situated sufficiently differently from the Category II veterans in *68 Filipinos* to warrant an individualized determination of his rights is nothing short of bizarre. Barretto was deprived of the opportunity for overseas naturalization for only 20 days, had ample op-

portunity for naturalization in the United States, and actually made such an application. Despite these material distinctions from *68 Filipinos*, the court of appeals ordered the government to grant Barretto's naturalization petition, even though the district court had found, after reaching the merits, that he was not entitled to that benefit. The court of appeals' decision in this case thus indicates that all Filipino veterans are entitled to naturalization notwithstanding the absence of any showing of prejudice in a particular case. That result squarely conflicts with this Court's teaching that a showing of prejudice is a necessary element of a due process claim. See *United States* v. *Valenzuela-Bernal*, No. 81-450 (July 2, 1982), slip op. 10.

4. A final factor that should have caused the courts below to eschew reliance upon collateral estoppel and to make a fresh determination of the merits is the substantial tension between the holding of *68 Filipinos* and this Court's decision in *Hibi*. In *Hibi* this Court confronted a claim identical to respondent's in all respects, except one—the label attached to the legal theory employed, which has now been changed from "estoppel" to "denial of due process". But the Court's conclusion in *Hibi*, stated without qualification, was that Hibi's "effort to claim naturalization under a statute which by its terms had expired more than 20 years before he filed his lawsuit must * * * fail." 414 U.S. at 9. Moreover, neither the Court's opinion nor the argument of Hibi's counsel was dependent upon the technical elements of equitable estoppel doctrine. On the contrary, the argument advanced by Hibi and rejected by this Court is not meaningfully distinguishable from the arguments later adopted in *68 Filipinos*.[33]

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[33] In this Court Hibi argued that under Section 701 the INS had an absolute duty to make naturalization possible for servicemen eligible under Section 701 except where wartime conditions made that impractical (Memo. in Opp. at 3-5, *INS* v. *Hibi*, No. 72-1652 (1973 Term)); that the Attorney General impermissibly "*single[d] out Filipino soldiers in the Philippines * * * to deny to all of them the*

It is difficult to reconcile Judge Renfrew's conclusion in *68 Filipinos* that Attorney General Clark's actions denied due process of law to Filipino veterans with this Court's conclusion (414 U.S. at 8-9) that the very same actions did not constitute "affirmative misconduct." For present purposes, however, we need not conclude that *Hibi* is dispositive of the merits of respondent's claim. It is enough to conclude that due regard for the authority of this Court's decisions required the district court and court of appeals in this case to treat the decision in *68 Filipinos* as one at least potentially "inconsistent with * * * [a] previous judgment[] in favor of" the United States (*Parklane Hosiery Co.* v. *Shore*, *supra*, 439 U.S. at 330), and thus to consider respondent's claim against the United States on its merits.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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Deputy Solicitor General

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MAY 1983

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opportunity to accept the offer of citizenship tendered them by Congress" (*id.* at 6; emphasis added); that the Executive's action violated the principle of separation of powers; and that the Executive "*failed to obey his constitutional mandate to enforce the laws*" (*ibid.*; emphasis added). Hibi also disavowed any narrow or technical construction of his "equitable estoppel" claim, arguing that "[e]quitable estoppel is only the name for a legal principle employed by the courts below to enforce [the] promise" to alien servicemen said to be contained in Section 701 (Mem. in Opp. at 12).

APPENDIX

STATUTES AND REGULATION INVOLVED

1. 28 C.F.R. 0.20 provides in pertinent part:

> The following-described matters are assigned to, and shall be conducted, handled, or supervised by the Solicitor General, in consultation with each agency or official concerned:
>
> * * * * *
>
> (b) Determining whether, and to what extent, appeals will be taken by the Government to all appellate courts (including petitions for rehearing *en banc* and petitions to such courts for the issuance of the extraordinary writs) * * *.

2. Sections 701, 702, and 705 of the Nationality Act of 1940, as amended, ch. 199, 56 Stat. 182-183, 8 U.S.C. (Supp. V 1945) 1001, 1002 and 1005, provided in pertinent part: [1]

> Sec. 701. * * * [A]ny person not a citizen regardless of age, who has served or hereafter serves honorably in the military or naval forces of the United States during the present war and Who shall have been at the time of his enlistment or induction a resident thereof and who (a) was lawfully admitted into the United States, including its Territories and possessions, or (b) having entered the United States, including its Territories and possessions, prior to September 1, 1943, being unable to establish lawful admission into the United States serves honorably in such forces beyond the continental limits of the United States or has so served may be naturalized upon compliance with all the requirements of the

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[1] The Nationality Act of 1940 was repealed by Section 403(a)(42) of the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 280.

naturalization laws except that (1) no declaration of intention, no certificate of arrival for those described in group (b) hereof, and no period of residence within the United States or any State shall be required; (2) the petition for naturalization may be filed in any court having naturalization jurisdiction regardless of the residence of the petitioner; (3) the petitioner shall not be required to speak the English language, sign his petition in his own handwriting, or meet any educational test; * * * *Provided, however*, That * * * the petition shall be filed not later than December 31, 1946. * * *

Sec. 702. During the present war, any person entitled to naturalization under Section 701 of this Act, who while serving honorably in the military * * * forces of the United States is not within the jurisdiction of any court authorized to naturalize aliens, may be naturalized in accordance with all the applicable provisions of section 701 without appearing before a naturalization court. The petition for naturalization of any petitioner under this section shall be made and sworn to before, and filed with, a representative of the Immigration and Naturalization Service designated by the Commissioner or a Deputy Commissioner, which designated representative is hereby authorized to receive such petition in behalf of the Service, to conduct hearings thereon, to take testimony concerning any matter touching or in any way affecting the admissibility of any such petitioner for naturalization, to call witnesses, to administer oaths, including the oath of the petitioner and his witnesses to the petition for naturalization and the oath of renunciation and allegiance prescribed by section 335 of this Act, and to grant naturalization, and to issue certificates of citizenship; * * *

> Sec. 705. The Commissioner, with the approval of the Attorney General, shall prescribe and furnish such forms and shall make such rules and regulations, as may be necessary to carry into effect the provisions of this Act.

3. Section 310(e) of the Immigration and Nationality Act of 1952, as added by Pub. L. No. 87-301, 75 Stat. 656, 8 U.S.C. 1421(e), provides:

> Notwithstanding the provisions of section 405 (a)[2] any petition for naturalization filed on or after September 21, 1961, shall be heard and determined in accordance with the requirements of this subchapter.

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[2] Section 405(a) of the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 280, was a general savings clause that preserved the legal effectiveness of certain acts taken under provisions of prior law that were in other respects superseded by the 1952 Act.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1963 406021 1347

Office-Supreme Court, U.S.
FILED
JUL 15 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-849

In The

Supreme Court of the United States

October Term, 1982

UNITED STATES OF AMERICA,

Petitioner,

vs.

SERGIO ELEJAR MENDOZA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT

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QUESTION PRESENTED

Whether the Court of Appeals properly ruled that the United States was collaterally estopped from relitigating a question of constitutional law by the judgment of a district court in a prior case, involving the same subject matter, in which the question was resolved adversely to the United States and in which the United States voluntarily withdrew its appeal.

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No. 82-849

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UNITED STATES OF AMERICA,

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vs.

SERGIO ELEJAR MENDOZA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT

SUMMARY OF ARGUMENT

On the facts of this case, the Government should not be excepted from the rule of collateral estoppel as applied in *Parklane Hosiery Co. v. Shore*, 439 U. S. 322 (1979) and *Montana v. United States*, 440 U. S. 147 (1979).

1. *Parklane* stands for the rule that unless the application of collateral estoppel would be unfair, a party that litigated an issue in a prior lawsuit should not be allowed to relitigate the same issue in a subsequent action against another opponent. Although *Parklane* involved the relitigation of an issue of fact between private parties, the same rule of fairness should be applied as well to the Federal Government, even on an issue of

law. There would be nothing unfair about estopping the Government in the circumstances of this case. It had a full and fair opportunity to litigate, and did litigate, the very same issues in the earlier case of *In re Naturalization of 68 Filipino War Veterans,* 406 F. Supp. 931 (N. D. Cal. 1975). Yet the Government inexplicably chose instead to drop its appeal from that judgment even though it knew that still more veterans would be filing identical claims and raising identical issues.

2. The Government should be estopped on the basis of *Montana* as well, for *Montana* did involve the application of estoppel against the Federal Government on an issue of law far more significant than the issue raised here. Nor is *Montana* distinguishable on the theory that it was more like res judicata than collateral estoppel. The result in *Montana* did not depend upon a distinction between the two doctrines. Applying a *collateral estoppel analysis,* this Court estopped the Government because the issues were substantially the same as those raised in an earlier case; because there had been no intervening changes in the controlling facts or legal principles of the two cases; and because there were no special circumstances which called for an exception to the usual rule of preclusion, such as the presence of an unmixed question of law founded upon a "different demand" from that of the first action. Application of the same three standards in this case compels a like result.

3. The Government cannot escape the application of estoppel in this case on the ground that it has a unique role as a litigant in enforcing the public law. Whether or not this role might have significance in some cases, it certainly has none in this case. This case and

the cases of the other war veterans do not affect any broad public interest. They are unique in their facts, and a similar factual situation, realistically, will not arise again. Moreover, the cases do not deal with issues that have a vital effect on our daily lives, such as the manner of enforcing the Clean Air Act at issue on the merits in *United States v. Stauffer Chemical Co.*, 684 F. 2d 1174 (6th Cir. 1982), *cert. granted*, No. 82-1448 (Apr. 18, 1983). Rather, these cases affect only a limited well-defined, ever decreasing group of aging veterans of World War II.

Given these circumstances, the government cannot argue that estoppel here hampers the development of the law. The veterans' cases do not have that magnitude of significance. In addition, contrary to the Government's claims, the decision of the court below does not hamper and has never hampered the government from seeking diversity of legal opinion through litigation outside the Ninth Circuit.

In sum, the rule of *Montana v. United States*, a case dealing with important issues, surely extends to this case which hardly engages the public interest or affects the state of the law.

ARGUMENT

On the Facts of This Case, the Government Should Not Be Excepted from the Doctrine of Collateral Estoppel.

A. The Principles of Parklane Hosiery Co. v. Shore and Montana v. United States Are Squarely Applicable to this Case and Call for the Application of Collateral Estoppel.

Collateral estoppel is founded on the proposition that:

> "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. * * *
>
> Application of both doctrines [i.e., collateral estoppel and the related doctrine of res judicata] is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions." *Montana v. United States*, 440 U. S. 147, 153 (1979), citations omitted.

The application of collateral estoppel is subject to certain qualifications. For example, if the litigant can establish that prohibiting relitigation would be unfair, collateral estoppel does not apply. Likewise, if the facts or issues of the two cases are substantially different or present different claims, collateral estoppel would not apply because the same issue would not have been resolved in the prior lawsuit. Finally, there may have been an intervening change in controlling facts or legal principles or other special circumstances which call for an exception in a given case to the usual rule of issue preclusion.

Those are the lessons of *Parklane* and *Montana*. Squarely and unmistakably, they govern the outcome of this case, and preclude the Government from relitigating here the very same issues that were resolved against it in *88 Veterans*.

1. Application of Collateral Estoppel to the Facts of This Case Is Not Unfair to the Government.

The Government abandoned its appeal in *68 Veterans* with its eyes wide open.

The Government knew, given its statements in its brief to the Court of Appeals in that case, that other veterans beside the 68 themselves would take a victory in *68 Veterans* to mean that they too would be naturalized as American citizens.[1] Because *68 Veterans* involved so many veterans and was the first case to reach a court of appeals on the due process issue, the Government's decision to drop its appeal could only be taken by the veterans, and indeed by the Government itself, as a complete victory for all Filipino war veterans.

In *Parklane Hosiery,* this Court suggested that it might be unfair to preclude relitigation if the stakes in the first case were small, or the possibility of further litigation with other parties was not forseeable. Under either circumstance, said the Court, a litigant might have had little incentive to fully and vigorously pursue the initial litigation, or to appeal from an adverse judgment. 439 U. S. at 330.

But the stakes in *68 Veterans* were identical and the foreseeability of much future litigation was readily acknowledged by the Government itself. Thus, the Government contradicts itself when it suggests that the decision

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[1]See Brief for Appellant in *United States v. 68 Filipino War Veterans*, 9th Cir. No. 78-1832, at 19. The Government's knowledge that other veterans would apply is revealed as well in its petition for a writ of certiorari in *INS v. Hibi*, No. 72-1652 at 16-18.

below upset its "reasonable expectations" that it would be free to contest the naturalization of other veterans presenting the very same claim. Brief for the United States at 24.

An argument like that ought to fall on deaf ears. The only "reasonable expectations" that everyone had, including the Government, when its appeal was abandoned in *68 Veterans* was that all qualified Filipino war veterans would seek, and expect, to become American citizens without incurring the Government's further opposition.[2] Noting that the Government thus had every incentive to vigorously litigate *68 Veterans* and to prosecute an appeal from the adverse judgment, the Court of Appeals made this very point when it declared:

> "This is not a case where an original suit is followed by an unforeseen action involving much higher stakes. See *Parklane Hosiery*, 439 U.S. at 330, 99 S.Ct. at 651. On the contrary, in *68 Filipinos* the government faced 68 separate naturalization petitions joined together in one action, not a lone veteran seeking citizenship. It should have come as no surprise to the government that the effects of Judge Renfrew's decision would reach not only the 68 Filipinos before the court, but all similarly situated Filipino veterans, whatever their number." 672 F. 2d at 1327, Petition for Writ of Certiorari at 15a.

In *Parklane*, this court suggested that allowing collateral estoppel "may" be unfair to a litigant if the judgment relied upon for the estoppel is itself inconsistent with

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[2] That *68 Veterans* was not a class action changes nothing. Indeed, collateral estoppel would become a meaningless rule if it applied only in class action cases.

still another judgment in the litigant's favor.[3] As an inconsistent judgment which supposedly would make the application of collateral estoppel unfair here, the Government points to *Olegario v. United States*, 473 F. Supp. 185, rev'd, 629 F. 2d 204 (2d Cir. 1980), *cert. denied*, 450 U. S. 980 (1981).

Since the presence of an inconsistent judgment ***may***, rather than *would*, make the application of collateral estoppel unfair in a given case, the inquiry must center not on the fact of *Olegario* but on all pertinent circumstances to determine whether its existence does or does not make it unfair to estop the Government here.

There are several reasons why the presence of *Olegario* does not make it unfair to estop the Government here.

First *68 Veterans*, like this case, arose in the Ninth Circuit while *Olegario* was decided in another circuit. As noted in *Montana*, collateral estoppel is central to the purpose for which civil courts have been established, the "conclusive resolution of disputes *within their jurisdictions*." 440 U. S. at 153 (emphasis supplied). The court below was serving this purpose in applying collateral estoppel in this case. It was also promoting the uniformity of law within its jurisdiction.

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[3]The Government once again distorts the Court's opinion on this point. The Court, contrary to the Government's assertion, did not say that presence of an inconsistent judgment "would" make the application of collateral estoppel unfair. Rather, by using the word "may" the Court plainly meant that an inconsistent judgment could be one among other factors for determining whether estoppel would be unfair. This same error was made by the Government in its petition for a writ of certiorari, at 24.

Second, as the court below noted, any unfairness that may result from the application of collateral estoppel in this case is no greater than that resulting whenever circuits disagree. That is to say, it is not unusual for the Government or any person or entity litigating in more than one circuit to face a situation where different circuits have different rules concerning the same subject matter. The effect of collateral estoppel in this case is merely to fix *68 Veterans* as the rule of the Ninth Circuit, not of any other circuit. The fact that *Olegario* is contrary to *68 Veterans* does not create a situation that is unusual for the government or by definition prejudicial to it.

Third, the Government claims that the mere existence of *Olegario's* decision on the merits required the court below also to reach the merits for the sake of the law's development in the sense that a Ninth Circuit decision on the merits, if contrary to *Olegario,* would facilitate this Court's resolution of the merits.

In taking this position, the Government loses sight of the procedural posture of this case. This case does no damage to the Government's asserted interest in review by this Court for the simple reason that the case is in this Court now. If the court below is reversed, the Government will have its opportunity to contest the merits. If it loses on the merits on remand to the Ninth Circuit, it can bring the intercircuit conflict on the merits before this Court. On the other hand, if this Court affirms the court below, the Government cannot be heard to say that there would be or should ever have been a conflict between the circuits on the merits.

Fourth, this case is unlike the famous example of multiple lawsuits arising from a railroad accident as noted

in *Parklane*, 439 U.S. 330 n.14. In that situation, the defendant railroad, by winning the first 25 of 50 identical lawsuits had no way to protect itself against the possible application of collateral estoppel in future cases. Therefore, estopping it after a loss in the 26th case would be unfair. But in this instance, the Government *lost* the first case involving numerous veterans, and because it knew that future litigation was certain, had every incentive to pursue its appeal. Given those circumstances, the subsequent decision of a court in another circuit does not change the fact that estopping the Government now would not be unfair.

Fifth, the rationale of *Olegario* is unpersuasive. There, the court accepted, without critical analysis, the Government's assertion that relitigation was warranted because the case raised issues of national significance. As the discussion in part B of this brief below will more fully establish, however, the claims made by an aging group of World War II veterans can no longer be viewed realistically as involving issues of critical national importance.

Finally, estopping the Government in this case would promote uniformity in the application of our naturalization laws, the very same uniformity the Government says is so desirable. Brief for the United States at 18. Estoppel would actually promote uniformity because unless the Government is estopped there will be a substantial inequality in the enforcement of the naturalization laws among the very same group of applicants. More particularly, there will be those veterans who were included in *68 Veterans* and the Government's grandfather policy who are now enjoying the benefits of their American citizenship with the Government's blessing, and those, like Dr. Men-

doza, who would have to continue the fight for their long overdue citizenship and cannot understand why, unlike their former comrades, they continue to encounter the Government's stubborn and inexplicable opposition. Such inequality is to be discouraged.

Of course, *Parklane* involved an action between private parties over the relitigation of an issue of fact. Consequently, *Parklane* cannot be said to have precluded consideration in this case of an established exception to the rule of collateral estoppel relating to the relitigation of issues of law founded upon a demand which is different from that made in the first action.[4] *United States v. Moser*, 266 U. S. 236 (1924).

Nevertheless, there is nothing in *Parklane* which suggests that the fairness standard of *Parklane* should not be applied to issues of law as well, even when the Federal Government is the party to be estopped. Indeed, there are no policy reasons why the fairness test should not be applied to such cases. If the underlying rationale of collateral estoppel is the finality of judgments, then the fairness rule has equal applicability in all instances. After all, as this court recognized in *Montana*, a case plainly involving an issue of law and the Federal Government, collateral estoppel applies only to a party who has had a "full and *fair* opportunity" to litigate the very same issue before. 440 U. S. at 153, emphasis added. Consequently, the standard of fairness is inherently involved in the application of collateral estoppel in all instances. Obviously, in assessing the matter of fairness itself in a given

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[4]A discussion of the effect of that exception in the circumstances of this case appears in part A-2 of this brief below.

case, the fact that the case concerns an important matter of law, or that the Federal Government is a party, may be important factors for consideration. But as will be discussed more fully later in this brief, no such concerns are at stake in the most unusual circumstances of this case.

2. The Standards Applied in Montana to Determine the Applicability of Collateral Estoppel Compel a Like Result in This Case.

At issue in *Montana* was the constitutionality, under the Supremacy Clause, of a state tax indirectly imposed upon the Federal Government. The first action was brought by a private contractor, Kiewit, at the instigation of the Federal Government. Kiewit's role in the litigation was financed, directed and controlled by the Federal Government. At the Federal Government's direction, Kiewit withdrew an appeal in this Court from an adverse decision of the Montana Supreme Court. The Government then proceeded instead with a suit it had previously filed in its own name in the United States District Court.

Because of the relationship between the United States and Kiewit, the Government now attempts to escape the impact of *Montana* by suggesting that *Montana* was "in practical effect" a case of res judicata, rather than collateral estoppel, and is therefore inapplicable. Brief for the United States at 22. It was no such thing, in "practical effect" or otherwise. Res judicata and collateral estoppel are related but distinct concepts, and this Court's analysis plainly recognized the distinction. 440 U. S. at 153. Obviously, the Government's relationship with Kiewit was critical, for otherwise the Government might not have had a "full and fair opportunity" to litigate the issues in the first case and collateral estoppel would have been

inappropriate. The Court's discussion of that relationship is therefore consistent with the application of collateral estoppel.

Moreover, if the Court had classified the case as res judicata, it could have stopped after finding that Kiewit was the Government's proxy in the first case, for the identity of parties or their privies, given an identity of issues, would have been sufficient to trigger the application of res judicata. Instead, because the Government was not in fact Kiewit or its privy, the Court went on to decide the case under a three part collateral estoppel analysis. *Montana,* in other words, is a case which, by definition, plainly involved the application of collateral estoppel.

As described in *Montana,* the three inquiries which must be made to determine the appropriate application of collateral estoppel are: first, whether the issues presented in the second case were "in substance the same" as those resolved against the United States in the earlier case; second, whether "controlling facts or legal principles" have changed significantly between the two actions; and third, whether "other special circumstances warrant an exception to the normal rules of preclusion." 440 U. S. at 153. Measured against the same three standards, collateral estoppel should be applied in this case to prevent the Government from re-litigating the issues presented in *68 Veterans.*

The Government does not suggest that controlling facts or legal principles have changed since *68 Veterans.* Instead, it concentrates its attack under the first and third *Montana* inquiries by suggesting that "significant legal contentions" raised in this case were not addressed

in *68 Veterans,* Brief for the United States at 39 and 15, and by arguing that this case involves a "special circumstance" fitting within the *Moser* exception to collateral estoppel that is applicable to "pure questions of law arising in successive actions on substantially unrelated claims." Brief for the United States at 21.

As "significant legal contentions not addressed" in *68 Veterans* but which are raised here, the Government refers to the question of laches; the effect of 8 U. S. C. 1421 (e) which permits naturalization only in accordance with current statutory provisions; the precedential effect of *INS v. Hibi,* 414 U. S. 5 (1973); and Dr. Mendoza's alleged lack of standing to complain that he had been injured by withdrawal of the naturalization examiner from the Phillipines in 1945 because he, Dr. Mendoza, had an opportunity to apply for naturalization in the United States in 1945. Brief for the United States, at 39 and 15.

With respect to the first three matters, the Government is plainly mistaken. Had it bothered to review the record in *68 Veterans* or its own brief before the Court of Appeals in that case, it would have discovered that it opposed the naturalization of the veterans for all three of the stated reasons. See, for example, Brief of Appellant in *United States v. 68 Filipino War Veterans,* 9th Cir. No. 78-1832 at 40 (laches), 9 (8 U. S. C. 1421 (e)) and 33 (the effect of *Hibi*). Judge Renfrew specifically rejected the Hibi analogy in his opinion. 406 F. Supp. at 1031. And while he did not mention laches or the effect of 1421 (e), he must of necessity have resolved those matters against the Government for the simple reason that if he had agreed with the Government on those questions,

he could not have rendered his judgment in favor of the veterans.[5]

Unlike the *68 Veterans,* Dr. Mendoza did spend part of his military career in the United States and obviously could have applied for naturalization here had he known about the special naturalization law then in effect. In that sense, the facts of this case are different from the facts in *68 Veterans.* However, the proper inquiry under *Montana* is not whether there is some difference in the facts of the two cases but whether the issues addressed and resolved in the first case were so different "in substance" as to make collateral estoppel inappropriate. A difference in substance makes collateral estoppel inappropriate because collateral estoppel applies only when the party to be estopped had a full and fair opportunity to litigate the same *issues* earlier, an opportunity the party would not have had if the issues were substantially different.

The issue in *68 Veterans* and issue in this case are the very same—whether the Attorney General had the constitutional power to withhold the services of a naturalization representative from the Phillippines during the last days of World War II and its aftermath. That identity of issues is not affected or altered by Dr. Mendoza's presence in the United States for a time. The important fact is not that he was in the United States but that *he was in the Philippines* during the time when the natu-

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[5]The fact that certain issues raised during a lawsuit are not specifically mentioned in a court's written opinion does not mean those issues were not considered or resolved. *Winters v. Lavine,* 574 F. 2d 46 (2d Cir. 1978).

alization examiner was forbidden by the Attorney General from naturalizing qualified Filipino veterans there. Hence, he could not have applied there even though he was still eligible to apply at the time. Thus, the due process issue he has raised, is the very same issue resolved against the Government in *68 Veterans,* where the Government plainly had its very full day in court.

Turning to the third *Montana* inquiry, the Government says it should be excepted from the rule of collateral estoppel on the basis of *Moser* because this case involves an issue of law arising in successive actions on "substantially unrelated" claims. Brief for the United States at 21. The exception enunciated in *Moser* is to the effect that:

> "Where, for example, a court in deciding a case has enunciated a rule of law, the parties in a subsequent action *upon a different demand* are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases. But a *fact, question or right* distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law." 266 U. S. at 242. Emphasis added.[6]

By definition then, the *Moser* exception applies only when the second action involves a "different demand." The critical question therefore involves the meaning of the term "different demand." Interpreting the *Moser* exception, this Court made it plain in *Montana* that a "different demand" is not simply one presented by a different litigant, as the Government seems to argue. Instead, a de-

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[6]The same emphasis was added by this Court when it referred to the same quotation in *Montana*. 440 U. S. at 162.

mand is "different" if it is related in neither time nor subject matter to that presented in the first case. 440 U.S. at 163.

The conceptual difficulties in delineating the scope of *Moser* were no particular problem to the Court in *Montana*, for it found that the demands of the second case were so "closely aligned in time and subject matter" to those of the first lawsuit as to make the *Moser* exception inapplicable. In this case, the "demand" of Dr. Mendoza is just as "closely aligned in time and subject matter" to those of the *68 Veterans*, for both concerned events that occurred in the aftermath of World War II, and both involved the constitutionality of the Attorney General's conduct at that time.

These factors take on increased significance when one considers the policy reasons for limiting the *Moser* exception to claims which are not substantially related in time or subject matter. As noted in *Montana*, those reasons concern the risk that the unreflective invocation of collateral estoppel could have the effect of freezing constitutional doctrine "where changing patterns of conduct or social mores are critical." 440 U.S. at 163. Thus, it follows that when two successive cases are in fact closely aligned in time and subject matter, there are no such risks to outweigh the fundamental purpose of collateral estoppel itself. Stated another way, there are no changing patterns of conduct or social mores which render the application of estoppel inappropriate in such a case.

Because the demands of Dr. Mendoza are not "substantially unrelated" to those of the *68 Veterans*, his claim is not a "different demand". Rather, this case belongs

within the second part of *Moser* and becomes, if not a fact or right, certainly a "question" adjudged in *68 Veterans* which "cannot be disputed in a subsequent action. . . ." 266 U. S. at 242.

B. The Role of the Government as a Litigant Enforcing the Public Laws Does Not Prevent the Application of Collateral Estoppel Against the Government in This Case.

Arguing from the uniqueness of its role as a litigant, the government asks this Court to accept the sweeping proposition that not only should issue preclusion not be applied in this case but, indeed, should *never* be applied to the government in any case especially when it is acting to enforce the public law. Brief for the United States at 25-26. Such an unprecedented immunity from preclusion would be extremely damaging to law and society. Beyond this, however, the present case does not even raise issues that any longer have a serious bearing on the enforcemnt of the public laws. Thus, although aspects of the government's role as a litigant might in some instances argue against the application of preclusion, they have no such weight in this case.

1. The War Veterans Litigation No Longer Involves Issues of National Importance.

In support of its position, the government notes that it is frequently a party to cases that raise "issues of greatest public importance, including constitutional issues. . . ." Brief of the United States at 28. And, indeed, the government is a party to a great deal of litigation that affects the lives of great numbers of persons, often to a serious degree. Yet, while all this may be true, it does not follow

that preclusion should not be applied when a case to which the government is a party does not raise an issue of great public importance. In such an instance, there is no public interest that can arguably override the policy of finality of judgments that underlies the doctrines of preclusion. The present case is such an instance. The war veterans litigation does not raise on its merits issues of any great moment or urgency. Additionally, the government's concern about recurring issues is misplaced here. Brief for the United States at 25, 28, 30. The cases of the war veterans involve a combination and sequence of circumstances so peculiar that, realistically, they will not occur again.

First of all, the cases deal with a discrete group of persons, namely, applicants for citizenship who can show requisite military service and who were unable to apply for citizenship due to the government's intentional failure to station a special naturalization examiner in the Philippines during relevant times. Given the passage of years, this discrete group is fading. Moreover, no new persons can now or ever could enter the group. Second, in question is a law, namely, § 702 of the Nationality Act of 1940, that strictly limits eligibility for citizenship to definite places of military service and times of service. This law cannot be extended to cover any persons other than the discrete group mentioned above. Third, the type of factual and legal context involved in the litigation of the war veterans will not arise again.[7] Fourth, the war veterans

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[7]For it to do so, there would have to be another major emergency like World War II; in response to the emergency, Congress would have to enact naturalization laws similar to

(Continued on next page)

litigation raises no questions affecting the daily conduct of the government's business such as the proper methods of enforcement of a statute or regulation with a pervasive national effect. *See United States v. Stauffer Chemical Co.*, 684 F. 2d 1174 (6th Cir. 1982), *cert. granted*, No. 82-1448 (Apr. 18, 1983). Cases like *Stauffer Chemical* can have a tremendous national impact because they may concern, for example, the quality of our environment through the manner in which the environmental laws are enforced. The issues in the veterans cases, however, have a present day vitality not to the nation at large, but only to the ever decreasing group mentioned above.

Having, somewhat surprisingly, implied that the war veterans litigation raises critical issues of national importance, the government then seeks to further distinguish *Montana v. United States* from the present case on the grounds that *Montana* did not involve a body of law applicable to a great number of persons and affected only the proprietary interests of the United States.[5] Brief for the United States at 35. Contrary to the government's char-

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(Continued from previous page)

those involved in the present litigation; the Attorney General would have to refuse to enforce those laws by withdrawing a special naturalization examiner from a United States possession about to become independent; and, finally, there would have to be later litigation, followed by the Government's inexplicable abandonment of an appeal from an adverse judgment in the face of the certainty of much future litigation involving the same stakes.

[5]The government's other attempts to distinguish Montana (namely, that Montana concerned unmixed questions of law and somehow involved the principles of *res judicata* rather than collateral estoppel) have already been discussed in Part A of this brief.

acterization of the case, *Montana* has a significance far outreaching that of the war veterans cases. Not only did the government see fit to finance and control the *Montana* litigation in two courts, but the number of states represented in the *amicus* briefs in this Court shows how seriously the taxation issue in *Montana* was regarded throughout the United States. *See* Amicus briefs, *Montana v. United States,* No. 77-1134. In addition, somewhat more than the proprietary interests of the government was in issue in *Montana.* Indeed, *Montana* concerned federal-state relations under the Supremacy Clause as related to the states' ability to impose an indirect tax on the federal government. Thus, the government cannot avoid application of *Montana* in this case by seeking to minimize *Montana's* significance while inflating the significance of this case out of all proportion. Rather, if the government could be estopped in *Montana,* it should *a fortiori* be estopped here.

In concluding this section of respondent's brief, we note that, although the government asserts the public interest in this case, it has never specified what it feels the public interest actually is. The court below sought to discover this interest in its query regarding whether the government had every incentive to diligently litigate *68 Veterans* or whether it was faced in the present case with an unforeseen action involving higher "stakes". 672 F. 2d at 1326-28; Petition of the United States at 11a-16a. The court concluded its opinion by noting that there appeared to be no critical need to redetermine the veterans' rights now and no discernable compelling public interest in redetermination. 672 F. 2d at 1329-30; Petition of the United States at 19a-20a.

The government would now like to characterize the court below's discussion as based on an improper assumption that the United States has an obligation to justify its litigating conduct to the courts.[9] Additionally, it claims that the court's language regarding a "critical need" and a "compelling public interest" really amounts to the establishment of a standardless discretion. Yet, it is clear that the court below was not doing this at all. Rather, it was seeking what might be the public interest that the government continually asserts but never defines.[10] For, after all, in this case, "public interest" is one way of defining the "stakes." In the circumstances, the position of the court below is both reasonable and easy to state. It was faced with a situation where the Government failed to pursue an appeal from a significant judgment and was now asking the jurisdiction in which the judgment was rendered to give the judgment no effect on grounds of the public interest. The court quite naturally asked the party asserting the public interest simply to say what it is. The government, of course, has never done this.

2. The Application of Preclusion to the Government in This Case Will Not Result in the Disruption of the Development of the Law.

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[9]Although the government feels that it has no obligation to justify its "litigating conduct" to the courts, it seems to feel, somewhat contradictorily, that related type of conduct (namely, how the Solicitor General makes litigating decisions) should carry weight with this Court. Brief for the United States at 30-31.

[10]The Government does assert a vague interest in the enforcement of naturalization laws. Brief for the United States at 36. However, this case does not concern the enforcement of such laws. It concerns a deliberate decision *not* to enforce those laws.

The government's argument to the contrary is based on the proposition that, because the government sometimes finds itself advancing or defending the same or similar issues in a number of jurisdictions, it may eventually become subject to an adverse decision in one jurisdiction that will be used to preclude it in all others. The claimed result is that the decision of one court will be able to determine or freeze the law for all others.

This argument might have force in many situations, but certainly not in this case. This case is entirely distinguishable from cases like *Stauffer Chemical* or *Continental Can Co., U.S.A. v. Marshall*, 603 F. 2d 590 (7th Cir. 1979), wherein the Sixth and Seventh Circuits estopped the government from litigating questions of continuing vitality (respectively, whether private contractors of the Environmental Protection Agency are authorized by the Clean Air Act to conduct or participate in administrative searches or inspections; and whether economic or technical feasibility was the criterion for requiring engineering controls under a noise regulation of the Occupational Safety and Health Administration) because of the adverse judgments of courts in other jurisdictions.

Stauffer Chemical and *Continental Can* raise the possibility that the judgment of one court might be able to bind the government nationwide and thereby freeze legal development nationwide. However, the decision of the court below does no such thing. Rather, its application of estoppel was based on the judgment of a court within its jurisdiction. Moreover, that judgment has not hampered the government outside the Ninth Circuit. Indeed, the judgment in favor of the government in *Olegario* is witness to the fact that courts outside the Ninth Circuit

have not considered themselves bound by *68 Veterans*. In this respect, no disservice is being done to the value of allowing independent consideration of a legal issue by several courts. *See, e.g., E. I. DuPont de Nemours & Co. v. Train*, 430 U. S. 112, 135 and 135 n. 23 (1977). Indeed, the court below has previously served that same value. *See Western Oil & Gas Ass'n v. EPA*, 633 F. 2d 803 (9th Cir. 1980). Moreover, *68 Veterans* itself, although a district court case, serves this same value in that it is among varying decisions that would facilitate decision making on the merits by this Court, if necessary.[11] The foregoing considerations should be added to the factor that this case is not one that engages the public interest. *American Medical International, Inc. v. Secretary of HEW*, 677 F. 2d 118, 121 n. 24 (D. C. Cir. 1981). When this is done, it becomes clear that application of estoppel here is appropriate even though the government is a party.

3. Standefer v. United States Is Irrelevant Because It Involved the Distinctly Different Procedures of Criminal Law.

In seeking principles and precedent for its proposition that it should be immune from preclusion, the gov-

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[11]This result cannot be disguised merely by calling *68 Veterans* the decision of an inferior court entitled at most to a persuasive role under the doctrine of *stare decisis*. One can recognize a conflict in the circuits whether it arises from a decision of a Court of Appeals or from a decision of a district court which has become the rule of a circuit through application of collateral estoppel. This is the meaning of the remarks of the court below at 672 F. 2d at 1329 n. 14; Petition of the United States at 17a-18a n. 14.

ernment points to *Standefer v. United States*, 447 U. S. 10 (1980), in which this Court held that, in a criminal case against one charged with aiding and abetting, the government could not be collaterally estopped by the prior acquittal of the principal. The government suggests that *Standefer* authorized its immunity from preclusion in all cases because, in identifying the strong federal interest in the enforcement of the criminal law, this Court referred to *Parklane Hosiery* and *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U. S. 313 (1971) as suits between private litigants involving private rights. 447 U. S. at 24. The government thus implies that *Parklane Hosiery* and *Blonder-Tongue* have been held to be inapplicable to it.

It would be wrong to apply *Standefer* to civil litigation. A simple reading of *Standefer* against its facts shows that the case concerns criminal law only. Further, and more importantly, the essential reason for the inapplicability of collateral estoppel in *Standefer* was that, under the *Parklane Hosiery* test itself, criminal prosecutions do not offer the government "the kind of 'full and fair opportunity to litigate' that is a prerequisite of estoppel." 447 U. S. at 22. In criminal cases, the government does not have the procedural rights and opportunities that are available in civil litigation—for example, discovery and appeal from an adverse judgment.

Thus, even though the Court determined that the Government could not be estopped in a criminal case, it reached its conclusion on the ground that, in a criminal context, the Government could not have the requisite "full and fair opportunity" that triggers estoppel. This rationale does not extend to areas other than criminal

law where the right to appeal and other litigation rights exist and thus render the question of full and fair opportunity pertinent.

4. The Government's Participation in an Unusual Amount of Litigation and the Solicitor General's Method of Deciding Which Cases to Appeal Are Not Relevant Considerations.

That "the government is involved in far more litigation than any other party," Brief of the United States at 27, is an assertion that is irrelevant to the issue now before the Court. Indeed, as noted, the government may be unique in that it participates in an unusual amount of litigation. However, the government is also unique in that it has far more resources for the conduct of its litigation than any state, private person, or corporation that is also compelled to litigate frequently and in a number of jurisdictions. Moreover, the doctrines of preclusion are not rules of housekeeping to be applied or not in order to help the government manage its caseload any more than they would be utilized to aid any other litigant for the same purpose. Last, the government's immunity from preclusion is more likely than not to increase its caseload as litigants, who might have otherwise relied on prior judgments, prosecute their own suits against the government.

The government further claims that it should never be subject to preclusion when issues of public importance are at stake because "through the Office of the Solicitor General, the government, unlike any other litigant, employs a formal mechanism for determining whether to take an appeal from or seek certiorari review of an ad-

verse decision." Brief for the the United States at 30. Although great respect is due to the Solicitor General, the doctrines of preclusion should not be abrogated simply because of the manner in which the Solicitor General makes decisions under 28 C. F. R. § 0.20. Moreover, the question of the effect of collateral estoppel in this case on the development of the law or on the government's ability to change its mind on legal issues over time, *see* Brief for the United States at 31-32, has already been canvassed above.

The government, however, utilizes the role of the Solicitor General to advance a slight but immaterial variation on the argument that preclusion will freeze development of the law. The government claims that, if it is subject to preclusion, the Solicitor General will have to abandon the practice of selectively pursuing appellate review in order to assure itself that the first adverse decision the government suffers on a question of law will not forever bind it. It argues that such will result either in an increased caseload for the higher courts or the finality of a possibly erroneous rule of law. In this case, however, these considerations are not affected by the role of the Solicitor General for the simple reason that, as discussed in preceding sections of this brief, the considerations are not involved here. No matter how germane they may be to a case like *Stauffer Chemical*, it remains that, as discussed previously, this case can have no such effects.

CONCLUSION

Throughout this brief, the Respondent has emphasized the facts of his case for the obvious reason that the application of collateral estoppel, in the last analysis, depends upon the circumstances of the case. Therefore, whatever merit there may be to the government's argument in another context, those arguments do not establish that estopping the government in the context of this case would be unfair or that some overriding public interest warrants an exception to the preclusion doctrine. The judgment of the United States Court of Appeals for the Ninth Circuit in this case should be affirmed.

Respectfully submitted,

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July, 1983

Office - Supreme Court, U.S.
FILED
OCT 25 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-849

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

SERGIO ELEJAR MENDOZA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Our contention in this case is that the United States may not be foreclosed from litigating a question of constitutional law of public importance by the unappealed adverse judgment of a district court in another case brought by a different opposing party. If upheld, the decision of the court of appeals would lead to a substantial alteration in litigation practices in the federal courts, because, in order to protect the public interest, the United States would be obliged to appeal from every adverse decision upon a question of law that affects or might affect its legal relations with other persons. The risk of preclusion would thrust aside the varied prudential considerations that frequently lead the government to eschew appeal in such cases under the present legal regime (see U.S.

Br. 30-31). While otherwise avoidable appeals would proliferate, this Court would be prevented from resolving the kind of recurring questions of national importance that divide the courts of appeals, because no such division would be tolerated. Thus, unless the United States were to seek and the Court were to grant certiorari following the first adverse decision rendered by a court of appeals, this Court's role as the final judicial arbiter of legal issues would be substantially impaired, and erroneous decisions would be given binding nationwide effect.

Respondent has not attempted any comprehensive answer to our contentions or provided any justification for this Court to endorse such a radical reworking of the existing judicial mechanisms for developing uniform, carefully considered and correct rules of public law. Indeed, respondent appears to concede that our analysis has force and would govern a wide range of other situations (see, *e.g.*, Resp. Br. 1, 17-19, 22-23, 26). But respondent offers a variety of reasons why *this* case should not be governed by the considerations that we have outlined. As we shall explain, the fact-bound distinctions upon which respondent relies do not withstand examination. But before turning to these points, we pause to emphasize a threshold point. Respondent is simply unable to identify any objective rules that would enable the courts to determine when collateral estoppel should be applied against the United States on questions of public law. Absent such rules, the government will necessarily be unable to predict with any degree of certainty the consequences of a decision to forego appellate review in a given case, and will be driven to adopt a less discriminating litigation posture that will burden the appellate courts with unnecessary

appeals. Furthermore, if the decision below were upheld, the scope of collateral estoppel itself would become a frequently litigated issue—a result entirely antithetical to the purposes that underlie the preclusion doctrine.

The unworkability of the subjective approach advanced by respondent is highlighted by comparing respondent's argument with that of the respondent in *United States* v. *Stauffer Chemical Co.*, No. 82-1448. Like Mendoza, Stauffer concedes (82-1448 Br. 25) that our argument may govern some class of cases, but claims that its own case is to be distinguished. Indeed, each respondent declines to defend the reasoning or result in the other's case (see 82-849 Resp. Br. 19; 82-1448 Resp. Br. 20 n.17, 26 n.23). The Court accordingly should be skeptical of the amorphous, self-serving formulations offered by these respondents to limit the general rules for which we argue.[1]

The shortcomings of respondent's approach must be assessed, moreover, against the alternative rule that we favor. Instead of the novel extension of collateral estoppel embraced by the courts of appeals in this case and *Stauffer*, we urge continued adherence to the traditional rules of stare decisis and res judicata as the best means for limiting unjustifiable relitigation without stifling the appropriate development of the law. Respondent has not offered any reason why continued application of the existing regime would not provide an adequate check upon the possibility of abusive or harassing relitigation. Nor has respondent explained why the policies underlying the

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[1] Copies of our opening brief and reply brief in No. 82-1448 have been provided to counsel for respondent.

issue preclusion doctrine require that he be excused from establishing his legal entitlement to naturalization.

A. 1. The court of appeals provided no explanation as to why this case was not controlled by the "unmixed questions of law" exception to the doctrine of collateral estoppel (see U.S. Br. 22). Respondent's effort (Br. 15-17) to supply a justification for that oversight is unsuccessful. Respondent does not deny that the underlying issue in this case is of constitutional dimensions (see Resp. Br. 14: "whether the Attorney General had the constitutional power to withhold the services of a naturalization representative from the Phillippines"). Instead, respondent invokes the "same 'demand' " rule that qualifies the unmixed question of law exception. But contrary to respondent's assertion (Br. 15-16), nothing in *Montana* v. *United States*, 440 U.S. 147 (1979), suggests that it is irrelevant for this purpose that respondent was not a party in the prior case, *In re Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931 (N.D. Cal. 1975). In *Montana*, of course, the party invoking the estoppel against the United States was the very party that had prevailed against the government's privy in the prior round of litigation presenting the issue. See 440 U.S. at 151.[2] Accordingly, the Court's holding in *Montana* that the near identity of the timing and subject matter of the two law suits made the "same 'demand' " rule—rather that the unmixed question of law doctrine—controlling provides no support for respondent's claim that *68*

[2] Similarly, in *Moser*, the "same 'demand' " rule was applied in a situation where the party invoking the estoppel was the one that previously had prevailed on the issue being litigated.

Filipinos should be treated as though it adjudicated his rights.

The "unmixed questions of law" exception recognized in *United States* v. *Moser*, 266 U.S. 236, 242 (1924) is stated in terms that presuppose an identity of parties, not because different parties were thought to render that exception inoperative, but because at the time *Moser* was decided it was settled that collateral estoppel itself had no application absent mutuality of estoppel. But even after the demise of the strict rule of mutuality, identity of parties is a significant consideration bearing on the scope of preclusion, at least on issues of law.

First, the availability, on liberal terms, of joinder, consolidation and class actions in many situations where common questions of law control the rights of similarly situated persons counsels against application of issue preclusion on legal questions where identity of parties is lacking.[3] Second, the applicability of stare decisis to questions of law and the persuasive force of decisions of coordinate and inferior courts on such questions is sufficient to prevent abusive relitigation. Third, although, as we argue in *Stauffer*, identity of parties in a prior case is not a *sufficient*

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[3] Collateral estoppel would not, as respondent claims (Br. 6 n.2), become "meaningless" if tailored so as to avoid preempting the function of class actions. Collateral estoppel would remain applicable, within established limits, to factual issues, and to fact-bound questions of law arising between parties that have previously litigated them. Given the choice as to which of the two legal regimes should govern the development of the law on a recurring question, the class action, which places all parties on notice as to the reach of the judgment to be entered, is far preferable to collateral estoppel, which provides no such certainty and which accordingly is likely to provoke further litigation about the scope of the initial judgment.

basis for estopping the government from securing a determination of a recurring question of public law of general applicability, it is assuredly a *necessary* condition if preclusion is to serve the purpose of "protecting litigants from the burden of relitigating an identical issue with the same party" (*Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 (1979)). Moreover, respondent makes no effort to justify the extension of collateral estoppel he unabashedly advocates (see Br. 10) in terms of the other policies ordinarily served by preclusion (compare U.S. Br. 24-25). And we submit that there can be no justification for relieving respondent of the requirement that he establish legal grounds for naturalization before he is accorded that " 'priceless treasure' " conferred by our laws. *Fedorenko* v. *United States*, 449 U.S. 490, 506-507 (1981) (citation omitted).

2. Even if the lack of identity between the parties in this case and *68 Filipinos* does not make the "same 'demand' " rule inapplicable, we could not agree with respondent's assertion that here, as in *Montana* (440 U.S. at 163), the legal demands of the successive lawsuits are so "closely aligned in time and subject matter" that a determination on the merits of the question of law is precluded. Respondent observes that both this case and *68 Filipinos* "concerned events that occurred in the aftermath of World War II, and both involved the constitutionality of the Attorney General's conduct at that time" (Br. 16). But this establishes only that the cases present common legal questions about particular official acts affecting numerous persons. If this degree of identity were sufficient to trigger the "same 'demand' " rule, the government would be obliged to take to this Court every case involving a challenge to legislative or executive

action affecting a class of persons, lest an adverse decision acquire class-wise preclusive effect. Cf. *FTC* v. *Grolier, Inc.*, No. 82-372 (June 6, 1983), slip op. 2-3 (Brennan, J., concurring).[4]

But there is no warrant for reading *Montana* in this fashion. Instead, we suggest that the Court's emphasis (440 U.S. at 163) upon the congruent timing of the successive lawsuits there was directed at the seemingly manipulative aspect of the duplicative litigation initiated by the government in that case. See 440 U.S. at 151-152; see U.S. Br. 35. Here, of course, there is no such close alignment in the timing of this case and *68 Filipinos*. Moreover, the initiation and the timing of both this case and *68 Filipinos* was in the control of the respective petitioners for naturalization; the government accordingly cannot be charged with seeking to relitigate the underlying issue. Instead, when respondent filed his petition for naturalization, the government simply insisted that the eligibility requirements for naturalization established by Congress be enforced. In sum, respondent Mendoza's "demand" to become a United States citizen cannot be considered the "same 'demand' " as the naturalization claims of the unrelated Filipino aliens in *68 Filipinos*.

B. Respondent appears to acknowledge (Br. 17, 19, 22) that the responsibility of the United States for enforcing Acts of Congress and the unique dynamics of the development of public law in govern-

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[4] We note that the Court repeatedly has recognized—without any hint of disapproval—the IRS' longstanding practice of formal nonacquiescence in decisions of the lower federal courts that it deems erroneous. See, *e.g.*, *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 483 n.18 (1979); *Dixon* v. *United States*, 381 U.S. 68, 72-75 & n.8 (1965).

ment cases that we outline in our opening brief (U.S. Br. 25-36) preclude application of collateral estoppel "in many situations" (Resp. Br. 22). But respondent urges that these considerations should not govern this case, asserting that the underlying issue is insufficiently important to warrant a determination on the merits (Br. 17-21), that development of the law would not be frozen if preclusion is applied here (Br. 21-23), and that preclusion would not be unfair to the government on the facts of this case (Br. 5-9). None of these arguments establishes any reason for relieving respondent of his obligation to establish a basis in law for his naturalization.

1. a. Respondent asserts (Br. 17) that the "war veterans litigation no longer involves issues of national importance" (Br. 17). But the underlying issue in this case, to which the issue preclusion doctrine was applied, is not whether it is desirable or acceptable as a matter of policy that respondent become a United States citizen.[5] Rather, any determination that respondent has a legal *right* to naturalization must resolve questions including whether the Attorney General's administration of Sections 701 and 702 of the Nationality Act of 1940 in the Philippines was unlawful, and if so, whether respondent was denied due process thereby and whether such a violation dictates that he be naturalized notwithstanding his inability to satisfy explicit statutory requirements

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[5] That, by contrast, is essentially what the government decided as to the naturalization petitioners in *68 Filipinos* when the appeal in that case was abandoned (U.S. Br. 11-12). As we have explained (U.S. Br. 30-31), the Solicitor General ordinarily considers a host of factors apart from the merits of the legal conclusions supporting a decision in determining whether further review is warranted.

for that benefit. These are issues of continuing importance, for it cannot be held that respondent is entitled to naturalization unless it is first established that the Attorney General is entirely without discretion to take into account pressing foreign relations interests of the United States in implementing the immigration and naturalization laws that he is charged with administering.[6] While the precise circumstances that led to the Filipino veterans litigation are necessarily unlikely to be repeated, the decision of the court of appeals perpetuates a highly restrictive view of the constitutional authority of the Executive branch to conduct the foreign affairs of the United States.

The second issue of enduring significance implicated in this case is whether the courts may effec-

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[6] The district court in *68 Filipinos* conceded that "the actions of the Commissioner of the INS were motivated by reasonable concern for the maintenance of amicable relations between the United States and the Philippine Islands" (406 F. Supp. at 951). Absent a determination that Section 702 deprived the Attorney General of all discretion, requiring him to make a naturalization representative available at all times wherever United States military personnel could be found, there is no basis for overriding the Attorney General's judgment in this matter. The *68 Filipinos* court, however, made no such determination. (Respondent appears to forget this (Br. 21 n.10).) Rather, its decision rested upon the novel view that absence of a naturalization officer from the Philippines for a part of the time Section 702 was in effect constituted discrimination on the basis of alienage, race or nationality that is subject to strict equal protection scrutiny under the Due Process Clause. This analysis would drastically restrict the United States' ability to deal with a host of difficult contemporary problems, such as those triggered recently by influxes of refugees from various nations, where delicate foreign relations concerns must be accommodated in the administration of the immigration laws.

tively circumvent the conditions that Congress has established pursuant to its constitutional authority to "establish a uniform Rule of Naturalization" (Art. I, § 8, Cl. 4). Respondent has never contended that he filed his petition for naturalization within the deadline fixed by Congress in Section 701 of the Nationality Act of 1940. And he has never established any reason for disregarding Congress's determination—reflected in 8 U.S.C. 1421(e)—that naturalization under expired provisions of law should be barred. Yet, because of the constitutional basis for the judgment in *68 Filipinos*, Congress is powerless, under the court of appeals' rationale, to deny naturalization to any Filipino veteran, at least if he resides within the Ninth Circuit.

This Court long ago recognized that "[a]n alien who seeks political rights as a member of this Nation can rightfully obtain them only upon terms and conditions specified by Congress." *United States* v. *Ginsberg*, 243 U.S. 472, 474-475 (1917). Because "Congress alone has the constitutional authority to prescribe rules for naturalization * * * the courts' task is to assure compliance with the particular prerequisites to the acquisition of United States citizenship by naturalization legislated to safeguard the integrity of this 'priceless treasure.'" *Fedorenko* v. *United States*, 449 U.S. at 506-507 (citation omitted). The Court has emphasized that "[e]nforcing the immigration laws" entails "[a]n increasingly important interest implicating matters of broad public concern." *INS* v. *Miranda*, No. 82-29 (Nov. 8, 1982), slip op. 5. Finally, the Court emphasized in *INS* v. *Hibi*, 414 U.S. 5, 8 (1973), that "in enforcing the cutoff date established by Congress [in Section 701 of the Nationality Act of 1940, the INS] is enforcing public

policy established by Congress." Accordingly, respondent's suggestion that no issue of national importance remains in this case must be rejected. Indeed, the Court's determination, in *Hibi*, that the compelling public interest that sets the United States apart from "a private litigant with respect to its enforcement of laws enacted by Congress" (414 U.S. at 8) forecloses application of ordinary rules of equitable estoppel to the United States, is sufficient to dispose of respondent's present contention, as well.[7]

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[7] We note that respondent has not quarreled with our demonstration (U.S. Br. 42-43 & n.33) that the substance of the due process argument endorsed by the district court in *68 Filipinos* had been rejected by this Court in *Hibi* itself.

Respondent does assert (Br. 13) that in *68 Filipinos* the district court rejected *sub silentio* the government's arguments on issues not addressed in its opinion, and that the court of appeals accordingly properly declined to address those issues in this case. Compare U.S. Br. 39. Respondent's assertion, however, is supported only by citation of the government's appellate brief in *68 Filipinos*, which was withdrawn. And even then respondent relies almost entirely on portions of that brief directed to the claims of "category I" veterans. Our review of the government's brief in opposition to naturalization in *68 Filipinos* confirms that the government did not argue in the district court that the "category II" petitions should be denied on the basis of laches, 8 U.S.C. 1421(e), or that *Hibi* bars the *remedy* of naturalization even if a due process violation were found—the specific argument based on *Hibi* that the court of appeals sidestepped here. (The discussion of *Hibi* in *68 Filipinos* itself does not pertain to this argument, either.) Finally, respondent acknowledges (Br. 14) that *68 Filipinos* did not address the facts of his case that call in question his standing to raise the due process claim. See U.S. Br. 39-42. Respondent's suggestion that the government nevertheless has had "its very full day in court" (Br. 15) is therefore incomprehensible.

b. Even if respondent's arguments for carving out an exception for this case from the general rule limiting collateral estoppel were more persuasive when viewed in isolation, their application would yield undesirable results and would undermine rather than advance the policies of collateral estoppel. It is simply impossible to draw a bright line between issues of "national importance" and other issues of lesser importance.[8] Under this standard, reasonable minds frequently would differ as to how any given issue ought to be classified. As a result, the government would be obliged to protect itself against the possibility of preclusion by appealing or seeking certiorari in a significant number of cases not deemed appeal-worthy or cert-worthy under present criteria (see U.S. Br. 31). Moreover, whenever the government eschewed an appeal and the legal issue addressed arose in a subsequent action, burdensome litigation respecting the applicability of collateral estoppel would be unavoidable. Such litigation would be particularly intractable because of a conspicuous lack of "judicially discoverable and manageable standards" (*Baker* v. *Carr*, 369 U.S. 186, 217 (1962)) by which to determine whether an issue is sufficiently important to warrant a fresh determination.[9]

On the other hand, there is no reason to believe, given the rule of stare decisis, that failure to apply

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[8] In the federal system, this Court alone exercises its jurisdiction on the basis of the importance of the issues presented in the cases coming before it. The courts of appeals have no such discretionary authority to refuse to decide legal issues in cases properly within their jurisdiction.

[9] Counting the amicus briefs filed in this (or any other) Court hardly provides an objective measure of importance of the underlying issue. Compare Resp. Br. 20.

the preclusion doctrine will foster undue relitigation. Contrary to respondent's suggestion (Br. 25), the litigating resources of the United States are sufficiently limited in comparison to its litigating responsibilities that powerful practical incentives foreclose improper relitigation. Furthermore, as we have explained (Br. 30-34), the principles of self-restraint and selectivity in government litigation have been institutionalized in the Office of the Solicitor General, which determines when a legal issue is of sufficient importance to the interests of the United States to warrant appellate litigation. Respondent has not demonstrated any pattern of unwarranted litigation that would support the proposed transfer of this function from the Executive Branch to the courts.[10]

2. Respondent acknowledges (Br. 22) that application of collateral estoppel to bind the government on legal issues could cripple the customary process of development of the public law through independent consideration of an issue by the various courts of appeals, with final resolution in this Court where further review is warranted. But respondent claims that the decision below does not present this problem because *68 Filipinos* was a decision—albeit that of a district court—from within the Ninth Circuit, and would not be applied outside the Ninth Circuit. Respondent's effort thus to cross-breed collateral estoppel and stare decisis (see U.S. Br. 29 n.21) cannot bear fruit.

First, respondent overlooks the fact that *68 Filipinos* was not a decision of the Ninth Circuit. The

[10] The Second Circuit's decision in *Olegario* v. *United States*, 629 F.2d 204 (1980), cert. denied, 450 U.S. 980 (1981), should be sufficient evidence that the government has not behaved unreasonably by adhering to its position in this case.

goal of uniformity of decision within a circuit is properly served if district courts (and panels of the court of appeals) follow circuit precedent. By contrast, if a court of appeals is required to follow an unreviewed district court decision simply because that decision arises from within the particular circuit, the goal of intra-circuit uniformity is carried to an absurd extreme, at the expense of inter-circuit uniformity, and at the expense of the overriding goal of correctness of decision. See *Standefer* v. *United States*, 447 U.S. 10, 23 n.18 (1980). The court of appeals' extension of collateral estoppel in this case thus represents an abdication of the court's appellate review responsibilities.[11]

Second, it ordinarily is not controlling for collateral estoppel purposes that the decision potentially to be given preclusive effect arose in a different circuit than the case in which the rule of preclusion is to be applied.[12] By contrast, "when the issue was determined in the first action by a trial court and in the

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[11] In addition, the value of independent appraisal of legal questions is not limited to the courts of appeals. Logically, the district courts must be equally free to consider afresh the legal conclusions of sister courts on recurring issues. Otherwise, the courts of appeals would be unable to engage in meaningful appellate review of district court decisions.

[12] We note that respondent's counsel, acting on behalf of the Association of Immigration and Nationality Lawyers, unsuccessfully urged the Second Circuit to apply collateral estoppel against the United States in *Olegario* v. *United States*, *supra*. See 629 F.2d at 207, 214-215. The Second Circuit's rejection of that argument did not rest upon the fact that *68 Filipinos* arose outside the Second Circuit. And the court of appeals below indicated only that it *might* view the case differently if the estoppel invoked were inter-circuit (Pet. App. 17a n.14).

second action will probably be taken to an appellate court" or when "the issue is of general interest and has not been resolved by the highest appellate court that can resolve it," issue preclusion is disfavored. Restatement (Second) of Judgments § 29 comment i (1982). Thus, the distinction drawn by respondent is perverse, mechanically elevating the decision of a single district court within a particular circuit above the decision of another court of appeals. Respondent's strained effort to reconcile the decision below with the traditional independence of the various courts of appeals, and with the role of this Court as the arbiter of inter-circuit conflicts, is understandable. But consistent adherence to the doctrine of stare decisis (along with its established limits) preserves the independent function of the circuits and the existing process of development of the public law without the paradoxical consequences that flow from respondent's hybrid of collateral estoppel and stare decisis.

Moreover, we are simply unable to understand respondent's treatment (Br. 8) of the impact of expanded collateral estoppel on the certiorari jurisdiction of this Court. Respondent acknowledges (Br. 23 & n. 11; see also Br. 8) that the decision below, coupled with *68 Filipinos*, creates a "conflict in the circuits" on the underlying issue when viewed against the Second Circuit's decision in *Olegario*. Respondent argues, however, that "any unfairness that may result from the application of collateral estoppel in the case is no greater than that resulting whenever circuits disagree" (Br. 8). But it is fundamental that when circuits disagree on a legal issue, this Court may resolve the conflict. Here, the logical implication of respondent's argument is that this Court would be obliged to uphold the decisions of *both* the Second and Ninth Circuits, on the peculiar theory

that each correctly states the law of its circuit. There is no reason to sanction such a bizarre result, which detracts from the authority of this Court as the final judicial arbiter of "what the law is" (*Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).[13]

3. Respondent also contends (Br. 5-9) that, on the particular facts presented, the application of collateral estoppel sanctioned by the court of appeals is not unfair. The thrust of respondent's contention (Br. 5-6) is that, by withdrawing its appeal in *68 Filipinos*, the government knowingly bound itself to accede to the naturalization of all Filipino veterans regardless of their failure to take any action to avail themselves of that opportunity prior to the statutory deadline. But, as we have previously explained (U.S. Br. 11-12 & n. 12, 31-32, 34 n. 29), there is no warrant for that characterization of the government's action. Nor did the government take any action that could have caused respondent or others similarly situated to rely to their detriment upon such an understanding of the government's position.[14]

As explained in our opening brief (at 12-13 & n. 13), the possibility that certain individuals who had filed their petitions for naturalization prior to withdrawal of the *68 Filipinos* appeal may have agreed to hold them in abeyance on the understanding that the result in *68 Filipinos* would be treated as a test case led to the adoption of the Solicitor General's "grandfather rule." But that policy was

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[13] This result is particularly ironic, because it would be the product of a legal doctrine that respondent defends as necessary to "promote uniformity" in the law (Resp. Br. 9).

[14] The passages in the government's appellate brief in *68 Filipinos* and its petition for a writ of certiorari in *Hibi*, to which respondent points (Br. 5 & n. 1), reflect only the anticipated stare decisis impact of the challenged decisions.

not extended to those, such as respondent, who had not filed a petition for naturalization before withdrawal of the *68 Filipinos* appeal and accordingly cannot claim detrimental reliance.[15] The government has thus more than met its obligation to abide by the *judgment* in *68 Filipinos*. See *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394 (1981). On the other hand, particularly at the time the appeal was withdrawn in *68 Filipinos*, neither the United States nor any Filipino veteran had reason to believe that the district court's legal conclusions would be controlling in all future cases. See U.S. Br. 34 n.29. The surprising extension of collateral estoppel effectuated in this case is indeed unfair to the United States, as well as to all those who seek naturalization in accordance with the requirements of the law. By contrast, respondent has not adduced any reason why he should be naturalized without establishing a basis in law for that benefit.

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

OCTOBER 1983

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[15] Respondent's argument (Br. 5-6) appears designed to benefit those Filipino veterans who did not even file a naturalization petition while *68 Filipinos* was pending, but who were simply counting on availing themselves of its holding in the event of a favorable decision. But those veterans adopting such a "wait and see" attitude would not in any event be permitted to invoke collateral estoppel. *Parklane Hosiery Co.* v. *Shore*, 439 U.S. at 330 & n. 13, 331. Respondent denies following this course (Pet. App. 16a n. 11).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1983 425002 125

No. 82-849-CFX
Status: GRANTED

Title: United States, Petitioner
v.
Sergio Elejar Mendoza

Docketed:
November 19, 1982

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Ungar, Donald L.

Entry	Date	Note	Proceedings and Orders
1	Oct 8 1982		Application for extension of time to file petition and order granting same until November 19, 1982 (Rehnquist, October 8, 1982).
2	Nov 19 1982	G	Petition for writ of certiorari filed.
3	Dec 27 1982		Brief of respondent Sergio Elejar Mendoza in opposition filed.
4	Jan 5 1983		DISTRIBUTED. January 21, 1983
5	Jan 6 1983	X	Reply brief of petitioner filed.
6	Mar 8 1983		Petition GRANTED.
			**********
7	Feb 4 1983	G	Motion of the parties to dispense with printing the joint appendix filed.
8	Feb 9 1983		DISTRIBUTED. February 25, 1983. (Motion of parties to dispense with printing the joint appendix).
10	Mar 8 1983		Record filed. (Certified original record and C.A. proceedings received.)
12	Mar 10 1983		Order extending time to file brief of petitioner on the merits until April 9, 1983.
13	Apr 8 1983		Order further extending time to file brief of petitioner on the merits until May 9, 1983.
14	May 12 1983		Brief of petitioner filed.
16	May 31 1983		Order extending time to file brief of respondent on the merits until July 16, 1983.
17	Jul 15 1983	X	Brief of respondent Sergio Elejar Mendoza filed.
18	Aug 15 1983		CIRCULATED.
19	Feb 28 1983		Motion of the parties to dispense with printing the joint appendix GRANTED.
20	Sep 21 1983		SET FOR ARGUMENT. Wednesday, November 2, 1983. (1st case) (1 hour)
21	Oct 25 1983	X	Reply brief of petitioner United States filed.
22	Nov 2 1983		ARGUED.